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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL AND PELHAM C. WILMERDING, ON BEHALF OF THEMSELVES AND ALL OTHER OWNERS AND HOLDERS OF BONDS OF NINE MILE-HALFWAY DRAIN DISTRICT OF MACOMB COUNTY, MICHIGAN,

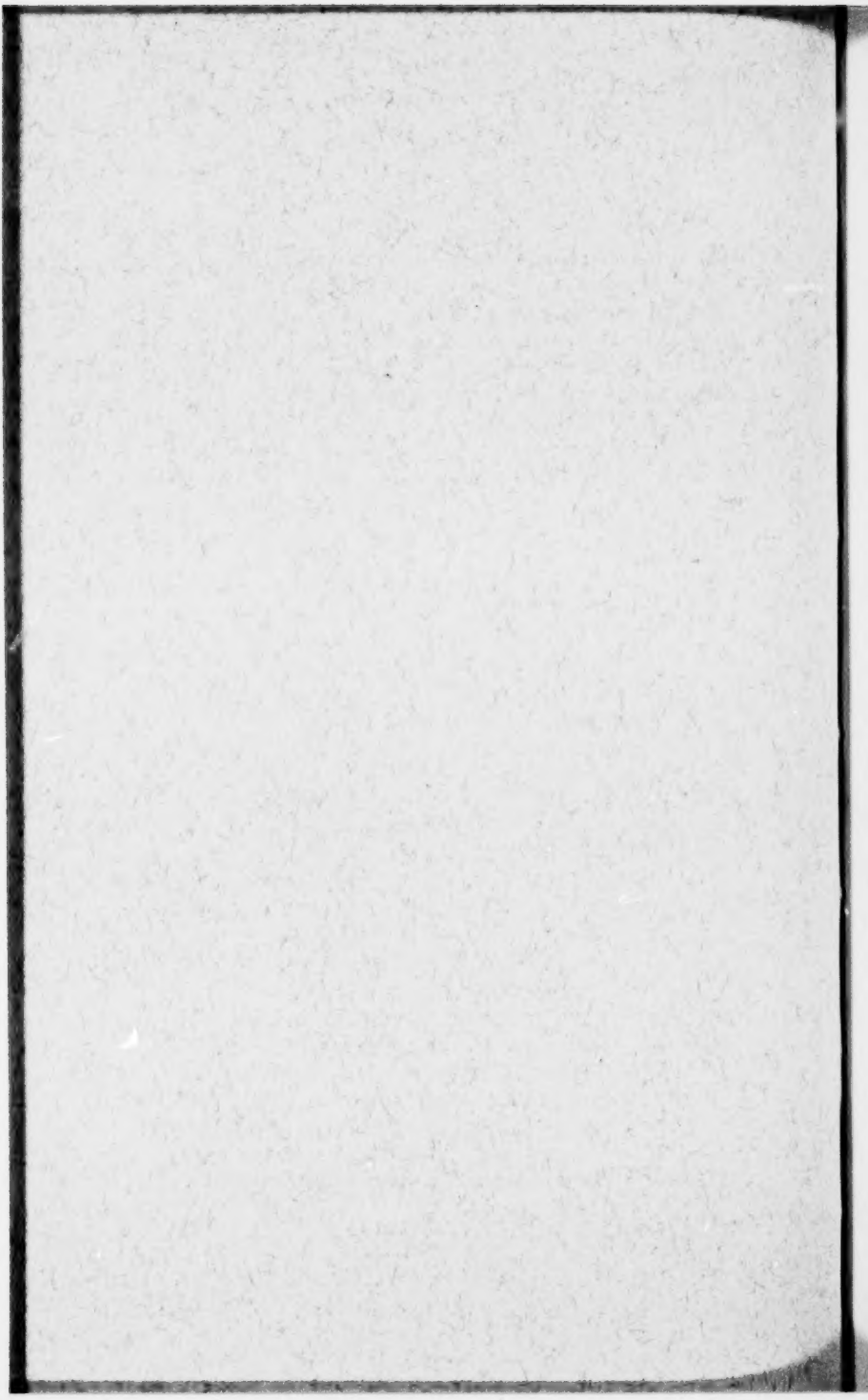
Petitioners,

vs.

NINE MILE-HALFWAY DRAIN DISTRICT, A PUBLIC QUASIM CORPORATION OF MACOMB COUNTY, MICHIGAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RAYMOND J. DYKEMA,
DAVID M. WOOD,
Counsel for Petitioners.



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KENNETH M. KEEFE, ERNEST E. QUANTRELL AND PELHAM C. WILMERDING, ON BEHALF OF THEMSELVES AND ALL OTHER OWNERS AND HOLDERS OF BONDS OF NINE MILE-HALFWAY DRAIN DISTRICT OF MACOMB COUNTY, MICHIGAN,

Petitioners (Appellees Below),

vs.

NINE MILE-HALFWAY DRAIN DISTRICT, A PUBLIC QUASI CORPORATION OF MACOMB COUNTY, MICHIGAN; CARL B. BRANDENBURG, COUNTY TREASURER OF MACOMB COUNTY; GUY L. BROWN, COUNTY CLERK OF MACOMB COUNTY; BERT ENGELBRECHT, DRAIN COMMISSIONER OF MACOMB COUNTY; SHERWOOD BENNETT, COMPTROLLER OF MACOMB COUNTY; BOARD OF SUPERVISORS OF MACOMB COUNTY; TOWNSHIP OF LAKE, A MUNICIPAL CORPORATION; TOWNSHIP OF WARREN, A MUNICIPAL CORPORATION; TOWNSHIP OF ERIN, A MUNICIPAL CORPORATION; CITY OF EAST DETROIT, A MUNICIPAL CORPORATION; VILLAGE OF CENTERLINE, A MUNICIPAL CORPORATION; ALFRED FOERSTER, CHRIST F. KAISER AND HENRY JACOBS, TAXPAYERS AND ALEXANDER L. WALTENSPERGER AND NELLIE WALTENSPERGER, TAXPAYERS,

Respondents (Appellants Below).

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioners pray that a writ of certiorari issue to review the judgment of the Circuit Court of Ap-

peals for the Sixth Circuit entered March 14, 1941, reversing a judgment of the District Court of the United States for the Southern District of Michigan entered September 15, 1939.

Opinion Below.

The opinion of the District Court (217) confirms a master's report (148). The opinion of the Circuit Court of Appeals (975) was entered March 14, 1941.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938.

Judgment of the Circuit Court of Appeals was entered March 14, 1941. Petition for rehearing was filed April 9, 1941, and denied May 9, 1941, without opinion. Issuance of mandate was stayed by order of that court dated May 15, 1941, for thirty days pending the application for writ of certiorari in this Court.

Summary Statement.

The suit in general involves the question of the right of petitioners, and others of the class for whom suit was brought, to enforce an issue of bonds, of which $1,980,000.00 are still outstanding, issued by the Nine Mile-Halfway Drain District of Macomb County, Michigan.

In Michigan, drain proceedings are conducted by a County officer, the Drain Commissioner, under authority of a law from which we have copied applicable provisions in the appendix (p. 1). The proceedings are instituted by a petition of land owners for the creation of a taxing

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(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record.)

district, followed by a petition for the location and establishment of a drain within the district. A finding of necessity must be made by an independent tribunal convened by the County Probate Court. Assessments to defray construction costs are levied against lands in the district, and may also be levied against the State, county and townships for benefits to roads and other public property. Such assessments may be divided into annual installments, and bonds may be issued in anticipation of the collection thereof. Authority is given to drain districts to issue bonds by Article VIII, Section 15(a) of the State Constitution, which provides: "Any drainage district established under provisions of law may issue bonds for drainage purposes within such district," and by Section 15, Chapter X, of the Drain Law (p. 11, Appendix). Taxes are collected, and if delinquent, enforced as general property taxes through the regular collection and enforcement agencies. Notice of publication, and in some instances personal service, is given of each important step in the proceedings. A review of any question involving any step in the proceedings is provided by certiorari, which must be taken within ten days after the final order of determination, the last step in the proceedings except the issuance of bonds, letting of contracts and confirmation of assessment roll. An appeal from assessment may also be taken within ten days after confirmation of the roll. Except for certiorari and appeal, the statute forbids any other attack on the proceedings, the legality of the drain, or taxes levied therefor. As taxes are collected they are placed in a bond redemption fund in the County treasury, and can be used only to service the bonds. Under some conditions the County is obliged to advance moneys to the redemption fund in case of deficiency, to be reimbursed by later collections of drain taxes. If the amount originally

levied is insufficient to pay the cost of the drain and bonds that have been issued, an additional levy is required. No prescribed form of drain is required, nor is it restricted to storm water. Cities, villages and townships may use it for sewage disposal, and sewage disposal and purification plants may be built in connection with it.

The bonds in question were issued in proceedings strictly conforming to the Drain Law (950-971), and were sold by the district to an investment house at par and accrued interest (256). The investment house almost immediately resold them to the public (257 and 936). With the money received the officers built the drain, which now has been in use for about fourteen years. Until November 1, 1931, maturing interest has been met, and $72,000.00 principal amount of bonds of the district paid. In May, 1932, County officers suspended interest payments and tax collections. Objection to payment of the bonds and levy of taxes is based upon the claim that the improvement was designed and built with the intention that it should serve the dual purpose of removing surface water and sanitary sewage, and that because of this underlying purpose the Drain Commissioner lacked jurisdiction. The proceedings originally designated the project as a tile drain (950-953) with a sewage disposal plant in connection therewith (961), and the official order of necessity (958) by the Board of Determination appointed by the Probate Court designated the project as a drain with "a disposal plant, filtration bed or other mechanical device which will properly purify the flow of said drain (to) be constructed and become a part of said drain as provided by Act No. 316 Public Acts of 1923, as amended by Section 5, Chapter XVII, Act No. 174, Public Acts of 1925." The project is an underground conduit with numerous inlets for the reception of surface water, and of sufficient capacity to transport surface water in times of heavy storms.

The bonds contain recitals (22) that they were issued for the building of the named drain, compliance with the drainage laws specified, and the due happening, existence and performance of all conditions precedent to make them legal and binding obligations.

Petitioners filed their bill (1) in the District Court, alleging the following: Facts necessary to confer jurisdiction on the District Court by reason of diverse citizenship, the proceedings for the building of the drain, the issuance and good faith purchase of the bonds, default and refusal to pay, and refusal to levy taxes. Foundation for an injunction to restrain the diversion of the drain fund was laid by allegations that various taxpayers had sued either to get possession of the fund, or to restrain the levy of further taxes against them or their lands. It appeared from this that the Supreme Court of the State of Michigan had decided that the project in question was illegal in an opinion reported in 257 Mich. 135, in the case of *Township of Lake* v. *Millar*. The Michigan court stated the contention of plaintiffs in that case as follows:

> "Plaintiffs, the township of Lake, Macomb county, Michigan, and a large number of individual landowners in Macomb county, brought the bill of complaint herein against Edward D. Millar, former drain commissioner of Macomb county, Bert Engelbrecht, drain commissioner of Macomb county, Walter Lehner, and William H. Hagen and Henry Heckman, the last two constituting the surviving members of the board of determination for the Nine Mile-Half Way drain, William Kruse, treasurer of Macomb county, the city of East Detroit, a municipal corporation, the village of Center Line, a municipal corporation, and the townships of Erin and Warren in Macomb county, to declare drain proceedings fraudulent and void; to restrain the assessment and collection of taxes or the reassessment and collection of the same; to restrain the drain commissioner and the county treasurer from

using or applying the funds raised by assessment toward the maintenance of the drain, disposal plant, filtration beds, and purification plant; to restrain the treasurer from collecting or attempting to collect the assessments levied against the lands and property of plaintiffs; to restrain the defendant Engelbrecht, his successors, agents, and employees from connecting any branch lateral or intersecting drains with the Nine Mile-Half Way drain, from increasing the overflow and inundation of streets of plaintiff township, to restrain the city of East Detroit, the village of Center Line, and the townships of Erin and Warren from connecting additional intersectors, laterals, branch drains, or sewers to said drain, and from creating any further burden of flowage and from increasing the overflow and inundation of the streets, highways, culverts, and lands of plaintiffs. They ask that defendant Bert Engelbrecht, drain commissioner of Macomb county, his successors, servants, agents, and employees, be restrained from permitting any sewage from the lands lying westerly from the disposal plant, filtration beds, and mechanical devices to purify the flow of said drain, to pass by or through said drain without first passing through the disposal plant, filtration beds, and other mechanical devices to purify the flow of said drain; that by mandatory injunction he be commanded to keep the disposal plant, filtration beds, and mechanical devices in constant and continual operation, and to cause all sewage from the lands lying in a westerly direction therefrom to flow through said plant, filtration beds, and mechanical devices; that the defendant Engelbrecht, his successors, agents, servants, and employees and defendants city of East Detroit and village of Center Line and townships of Erin and Warren, be ordered by decree of this court to take such steps as may be necessary to prevent the inundation of the streets, highways, and culverts and lands of plaintiffs caused by their having increased the flowage of said drain; that defendants be required to reimburse plaintiffs for the unlawful taking of their property and for damages, and that defendant treasurer of Macomb

county be required to reimburse plaintiffs for the assessments paid by them and for other relief. From a decree for defendants plaintiffs appeal."

The Supreme Court of Michigan held in that case as follows:

"The question is presented whether a petition for a drain confers jurisdiction upon the drain commissioner to build a sewer; whether a petition to the drain commissioner to do something within the scope of his authority confers jurisdiction upon him to do something wholly without the scope of his authority; whether a petition to do something he has a right to do confers jurisdiction upon him to do something which he had no right to do; whether upon filing a petition for a drain which he has a right to build, the commissioner may lay out and construct a sewer which he has no right to build? A drain commissioner may not, by mere assumption of authority, legally do that which he has no authority to do. If, upon a petition to do what he has a right to do, he may do what he has no right to do, the extent of his authority is measured by his own acts and conduct and not by law. The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority. The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari, but an entire want of jurisdiction may be taken advantage of at any time. The drain commissioner had no jurisdiction to construct a sewer any more than to construct a Covert road. No one will contend that if the drain commissioner, when the petition for a drain was filed with him, had laid out an assessment district, established and constructed a Covert road, the plaintiffs would have been without remedy. The same legal question is here presented. The proceedings are void for want of jurisdiction. The decree of the trial court is reversed, and decree will be entered for plaintiffs."

No bondholders were parties to the proceeding in the Michigan court. The *Millar* case, *supra*, was followed by two other taxpayers' cases in the Macomb County Circuit Court and no bondholders were parties to these other proceedings (14). The decree in the *Millar* case (25) held all drain proceedings invalid as to complaining parties but did not decree the bonds to be invalid.

The relief prayed by bondholders in this case was a decree establishing the bonds as valid obligations, mandatory injunction compelling the levy of taxes, maintenance of sinking funds, restoration of diverted moneys, accounting and payment of bonds from sinking fund or the County's general fund. The bill also asked that the Township of Lake and other plaintiffs in the *Millar* case, *supra*, be restrained from using the decree they had obtained to impede the collection of taxes. Respondents' answers consist of a denial of the validity of the bonds and taxes on the ground that the improvement was not a drain, and assert that by reason of that fact no rights accrued to bondholders.

The District Court made a limited order of reference to the Standing Master in Chancery who determined (89-96)—(a) all bonds were held by *bona fide* holders for value or by those succeeding to their rights, (b) present holders are entitled to rely on the truth of the recitals in the bonds, (c) defendants were estopped to deny the truth of the recitals.

While decrees for the plaintiffs were being settled in the District Court, the Circuit Court of Appeals decided *Royal Oak Drain District* v. *Keefe*, 87 Fed. (2) 786, and the District Court decided that because of a certain statement in the opinion in that case, it would be advisable to refer the case (144) to a Special Master to determine the primary purpose and character of the project and to settle the terms of the decree.

The Master took testimony (246, *et seq.*) in accordance with the previous orders of reference and filed a complete report (148-203). The Master in his report concluded that the improvement was illegal in the light of certain Michigan court decisions, but that inasmuch as the bonds contained recitals importing compliance with the law and proper performance of all conditions precedent, they were valid in the hands of present holders, and that the recitals were valid under Michigan law (191). He held that the State court decree obtained by Lake Township, *et al.*, was not *res judicata* against bondholders, since they were not parties to the record in that case, and under Michigan law which he cited the decree could not operate against them (151). He further held that there was no obligation on bondholders' part to intervene in the taxpayers' suit (152). Exceptions to the report were taken by defendants (204) on the ground that the Master should not have held that the court had jurisdiction, should not have found that bondholders occupied the position of good faith holders, and should not have applied the estoppel rule. No exception was taken on the ground that he should have held the State court decrees binding to any extent upon bondholders. Plaintiffs excepted (211) to the finding that the improvement was illegal. The court overruled all exceptions (219) and filed a short opinion declaring his view that the bondholders were entitled to recover because of defendants' estoppel to plead the falsity of the bond recitals (217). A judgment was entered substantially as prayed (220), which declared the bonds valid, directed officers to levy and collect taxes, to maintain sinking funds, and restrained defendants from using the decree obtained in the State court to prevent officers from making tax levies. The principal defendants then appealed to the Circuit Court of Appeals, which, as noted above, reversed the judgment.

The opinion of the Circuit Court of Appeals (979) agrees

with the district court in its conclusion that it had jurisdiction, that bonds are held *bona fide*, and that the projects are illegal under Michigan law. It refuses to consider a decision of the Michigan Supreme Court, *Detroit Trust Co.* v. *Dingman*, 291 Mich. 170, holding that a Michigan Drain Commissioner has power to build drains for the removal of both storm water and sewage, holds that parties other than the drain districts are not obliged to recognize the bonds as legal, that the districts are not estopped by their bond recitals, and that the decree in the *Township of Lake* v. *Millar* case, *supra*, is *res judicata* against bondholders. The latter is not stated as an independent ground for reversal, but appears to be interwoven into the court's entire process of reasoning. It is embodied in the question which the court says it has for decision (981), "Whether when the Michigan courts have held that these particular projects and all proceedings thereunder are void, the recitals in the bonds estop appellants, etc." The court had before it another issue which petitioners believe should have been considered in support of the judgment, *i. e.*, the binding effect of the statutory provision forbidding collateral attack on drain proceedings, which petitioners believe was not considered because of the court's view that the bondholders were barred by a prior adjudication.

Questions Presented by This Petition.

The fundamental questions presented are:

1. Whether due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States has been denied petitioners, and other holders of these bonds, in deciding that decrees in a suit brought by taxpayers in the drain district against the Drain Commissioner and others, to which suits no bondholders were parties, were *res judicata* of issues relating to the validity of the bonds

and remedies thereon on the theory that the Drain Commissioner represented bondholders, so that all matters decided in such prior suit, or which might have been decided therein, were adjudications against bondholders.

2. Whether in applying the law of the State of Michigan a Federal court is not bound by the entire body of such law contained in the statutes and court decisions, under such rules of interpretation and construction as the court of last resort of the State would be obliged to follow. Subsidiary to this question are the following:

(a) Whether when the State court of last resort has by its last decision declared the powers of drain districts to build drainage improvements of a particular character, the Federal courts can reject such decision on the ground that it involved a different drainage improvement, and that the State court had not specifically overruled its prior decision relating to the same improvement.

(b) Whether when a State court of last resort has rendered decisions holding that a municipal corporation is estopped against *bona fide* holders of its bonds to plead that the bonds are issued for a purpose different than that which is recited in the bonds, such decisions can be rejected in the absence of a clear showing that such decisions have been overruled.

(c) Whether public officers and other public bodies charged with the duty of performing acts necessary to provide funds for the payment of municipal bonds are excused from performing such acts when liability of the issuing municipality rests upon estoppel.

(d) Whether when a State statute provides that there may be no collateral attack on proceedings for the construction of a drain, and decisions in force when bonds for such

drain were issued interpret such statute to forbid collateral attack except where proceedings violate the constitution, such decisions can be rejected, it being the law of the State that rights which accrue under a statute as judicially interpreted must be judged in accordance with the same interpretation.

3. Whether the lower court has not rendered a decision in conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit, in *Fetzer* v. *Johnson,* 15 F. (2d) 145, and in conflict with the decision of this Court in *Chase National Bank* v. *City of Norwalk,* 291 U. S. 431, in refusing to enjoin parties who have obtained decrees or judgments in other courts from enforcing them in a manner inimical to the rights of parties not bound thereby.

Reasons Relied Upon for Allowance of Writ.

1. The United States Circuit Court of Appeals, Sixth Circuit has decided an important question of Federal law, probably in conflict with the Fifth Amendment to the Constitution of the United States, and in conflict with the decision of this Court in *Hansberry* v. *Lee,* 311 U. S. 32.

2. The United States Circuit Court of Appeals, Sixth Circuit, has decided important questions of local law, probably in conflict with local statutes and decisions in the following respects:

(a) It has decided that Nine Mile-Halfway Drain is an illegal structure, in the absence of any violation of the Drain Law by the officers who designed and built it and contrary to the interpretations of such law by the local court of last resort in *Kennedy* v. *Dingman,* 272 Mich. 24, and *Detroit Trust Co.* v. *Dingman,* 291 Mich. 170.

(b) It has decided that a municipality which issues its bonds, reciting therein that the same are issued for a pur-

pose which the law authorizes, is not estopped against *bona fide* holders of said bonds to plead the falsity of its recitals, which decision is in conflict with local decisions as follows: *Common Council* v. *Schlich*, 81 Mich. 405; *Thompson* v. *Village of Mecosta*, 127 Mich. 522; *Schmid* v. *Village of Frankfort*, 131 Mich. 197; *Bates* v. *City of Hastings*, 145 Mich. 574 and *Baker, et al.* v. *Ruddiman #3 Drain District, et al.*, unreported decision of United States District Court, Western District of Michigan, Southern Division.

(c) It has decided that public officers charged with the duty of levying and collecting taxes, maintaining sinking funds for the payment of drain district bonds, and the county charged with the duty of making temporary advancement of moneys in case of drain fund deficiencies, are not obliged to perform such duties when the validity of the bonds rests upon the estoppel of drain districts, its decision in this respect being without statutory warrant and contrary to general law.

(d) It has ignored and failed to give effect to Section 11, Chapter VI, of the Drain Law, Act 316 Public Acts of Michigan of 1923, as amended by Act 331 Public Acts of Michigan of 1927, Section 4902 Michigan Compiled Laws 1929 (see appendix, p. 8), the material part of which reads as follows: "If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity." It has failed to give effect to interpretations of this statute holding that collateral attack on the drain proceedings and taxes therefor is forbidden, contained in *Township of Clarence* v. *Dickinson*, 151 Mich. 270, and *Stellwagen* v. *Dingman*, 229 Mich. 159, and disregarded local decisions holding that judicial interpretations under which rights accrue must continue

to be applied to such rights notwithstanding subsequent inconsistent decisions, *i. e. Pittsburgh, etc., Iron Co.* v. *L. S. Iron Co.,* 118 Mich. 109, and *Donohue* v. *Russell,* 264 Mich. 217.

3. The United States Court of Appeals, Sixth Circuit, has decided important questions as to powers of Federal courts to restrain action to enforce judgments of concurrent courts in a way probably in conflict with the decision of the Circuit Court of Appeals, Eighth Circuit, in *Fetzer* v. *Johnson,* 15 F. (2) 145, and in conflict with the decision of this Court in *Chase National Bank* v. *City of Norwalk,* 291 U. S. 431.

4. The Supreme Court of Michigan now has before it a case which we believe will determine the view of the State court as to whether bonds containing similar recitals to those here involved are valid in the hands of good faith holders. City of Highland Park and other holders of bonds of another drain district, Royal Oak No. 7 Storm Sewer Drain District, have petitioned the court to issue a writ of mandamus to compel the Drain Commissioner of Oakland County, Michigan, and the Board of Supervisors of such county, to levy and spread drain taxes for such drain. *City of Highland Park, et al.* v. *Clark, et al.,* No. 41,960, Michigan Supreme Court. Respondents have pleaded that they should not be compelled to do so because, as they allege, the project is a sewer and was so held to be in *Village of Oak Park* v. *Van Wagoner,* 271 Mich. 450. Thus the same issue as was considered by the Circuit Court of Appeals will in all probability be decided within a few months, and will definitely determine the local law on the subject. Petitioners, therefore, believe that if this Court has any hesitancy to issue the writ of certiorari in this case, it should defer action until the State court of last resort has decided the pending action.

WHEREFORE, petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for its review and determination, as provided by the statutes of the United States, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 8573, Nine Mile-Halfway Drain District, et al., Appellants, v. Kenneth M. Keefe, et al., Appellees," and that the decree therein of said Court of Appeals be reversed by this Court, and that your petitioners may have such other and further relief in the premises as to the Court may seem just and proper.

Dated July 19, 1941.

KENNETH M. KEEFE, ERNEST E. QUANTRELL
and PELHAM C. WILMERDING,
Petitioners,

By DAVID M. WOOD, and
48 Wall St., New York, N. Y.,
Business Address,

RAYMOND J. DYKEMA,
2746 Penobscot Bldg., Detroit, Mich.,
Business Address,
Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

Opinions of the District Court consist of the two Reports of the Masters in Chancery (89-96; 148-203); opinion of the District Judge (217); opinion of the Circuit Court of Appeals, Sixth Circuit (975), reported 119 Fed (2d) 157. No opinion was filed upon denial of petition for rehearing. (1023)

II.

Jurisdiction.

1. The date of the decrees to be reviewed is March 14, 1941 (449); rehearing denied May 9, 1941 (505).

2. This suit was bropght to enforce rights of petitioners, and others of a class represented by them, as holders of bonds issued by the two drain districts described in the foregoing petition. The District Court had jurisdiction by virtue of diversity of citizenship. Judicial Code, Sec. 24, U. S. C., Title 28, Sec. 41.

The statutory provision which is believed to sustain the jurisdiction of this Court is Sec. 240 of the Judicial Code, U. S. C., Title 28, Sec. 347.

3. The cases believed to sustain jurisdiction are as follows:

Wuchter v. *Pizzutti*, 276 U. S. 13;
Western & A. R. R. v. *Henderson*, 279 U. S. 639;
Hansberry v. *Lee*, 311 U. S. 32;
Southern Railway Co. v. *Walters*, 284 U. S. 190;
Stringfellow v. *Atlantic Coast Line R. R. Co.*, 290 U. S. 322;

West v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179;
Chase National Bank v. *City of Norwalk*, 291 U. S. 431.

III.

Statement of the Case.

We deem the recital of facts contained in the "Summary Statement of Matters Involved" in the accompanying petition for writ of certiorari, together with the facts recited in the Master's reports (89 and 148), a sufficient statement to serve this Court in its consideration of this brief. Same are hereby adopted and made a part of this brief.

IV.

Specification of Errors.

The errors in the decision of the Circuit Court of Appeals which are relied upon by petitioners in this case are set out in the statement of "Reasons Relied upon for the Allowance of Writ" in the accompanying petition for writ of certiorari (12 *supra*). Petitioners will rely upon and urge before this Court all errors therein assigned. Same are hereby adopted and made a part of this brief.

V.

ARGUMENT.

Summary and Introductory Matters.

Since this is a class suit, we will refer to petitioners, and others in the class represented by them, as bondholders. We follow the grouping of questions involved, and reasons relied upon for allowance of writ of certiorari, but condense them to the following points:

1. Due process is denied petitioners by holding them barred from all remedies on their bonds by decrees in taxpayers' suits.

2. Lower court did not decide issues in accordance with local law.

(a) It rejected local interpretations of the drain statute in relation to the kind and character of drains which a drain commissioner is authorized to build.

(b) It rejected local authorities as to the effect of bond recitals.

(c) It held duties of officers and others in relation to collection of taxes and maintenance of funds dependent upon question of whether a legal drain had been constructed.

(d) It ignored the effect of statutes prohibiting collateral attack on the drain proceedings.

3. Lower court held it could not restrain use of taxpayers' decree to impede collection of taxes.

Recognizing that this Court must be convinced of the importance of the questions to be decided, as well as the lower court's error in deciding them, we shall discuss under each main point reasons which we think justify this Court in taking jurisdiction.

1. Denial of due process by holding bondholders barred from all remedies on their bonds by decrees in taxpayers' suits.

Courts, as well as other governmental agencies, must observe rules designed to afford due process, and this Court has no higher or more important duty to perform than that of enforcing the Fifth and Fourteenth Amendments. It has done so frequently where comparatively small amounts are involved. In this case a large amount is involved, and the decision will directly affect a large number of persons.

Courts seldom deliberately disregard the obligation to afford due process. When they do so it is the result of

errors in reasoning on some other matter. A frequent cause of this error lies in erroneous application of settled rules as to *res judicata*. Recently this Court was called upon, in *Hansberry* v. *Lee*, 311 U. S. 32, to reverse a State court because of its erroneous application of such rules. This Court there said:

> "But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process, it becomes the duty of this court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes."

Undoubtedly the same statement would apply when judgments of lower Federal courts are considered in connection with the Fifth Amendment. There is also considerable similarity between the *Hansberry* case and this in regard to the issues involved. There it was claimed that a former judgment was binding upon a litigant on the theory of representation by one of a class; here it is claimed on the theory of representation by a public officer.

We anticipate that respondents will say that this question need not be considered because the lower court might have reached the same conclusion without holding that the former decree was a binding adjudication, but we think such argument untenable in view of the language of the lower court's opinion. The principal question which the lower court declared was presented (981) included the fact of the decree of the court in the other case. Lastly, it expressly says (987), "Those cases are *res judicata* as to the determinative facts of this controversy." The argument thus presented in the lower court's opinion shows that the factor pertaining to the effect of the taxpayers' decree is so inter-

woven in the court's reasoning as to prevent the assumption that the court would have reached the same conclusion without it. See *State Tax Commission* v. *Van Cott*, 306 U. S. 511; *State of Minnesota* v. *National Tea Co.*, 309 U. S. 551. The principle is also well established that where an opinion gives two grounds for a conclusion, neither can be treated as obiter and disregarded by inferior courts. *Florida R. R. Co.* v. *Shutte*, 103 U. S. 118; *Union Pacific R. R. Co.* v. *Mason City & Fort Dodge R. R. Co.*, 199 U. S. 160. Unless this decision is reversed, it will require all district courts in the Sixth Circuit to hold that decrees in taxpayers' suits against the validity of proceedings under which bonds are issued are binding adjudications against bondholders, even though they are strangers to the case in which the decree is rendered. We assume that this court, in the exercise of its supervisory jurisdiction, would prefer to correct the error now, if it is an error, before it becomes a rule of decision for courts in this circuit.

The lower court says that petitioners are bound by a decree of the Supreme Court of the State of Michigan (23), in a suit by the Township of Lake and other taxpayers holding assessments for drain taxes to be illegal and void. From the one decree in the record and allegations concerning it in the pleadings, it is plain that this was an ordinary taxpayers' suit to relieve the taxpayers from a tax against them. Relief was not prayed against bondholders, and no bondholders were named as parties or served with process. The record contains neither allegation nor proof that any bondholder knew that such suit had been commenced. We believe it firmly established by this Court that even if they had known that such a suit was instituted, they were not obliged to intervene therein, for the court said, in reversing the same Court of Appeals *(Chase National Bank* v. *City of Norwalk*, 291 U. S. 431 (441)):

> "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. * * * Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights."

While the District Court regarded this pronouncement as binding upon it, apparently the Court of Appeals disagrees with it, for in the course of its opinion (p. 988) it indicated that petitioners should have intervened in the suits which resulted in the decrees.

The Court of Appeals' reasoning that the decree obtained by Lake Township and other taxpayers was an adjudication against bondholders is difficult to account for on any known principle of law. Such decree amounts only to a declaration that taxes against the plaintiffs in that suit are invalid. It neither adjudicates the invalidity of taxes against other lands and municipalities, nor the invalidity of bonds. The lower court ignores the principle which it formerly recognized in *Royal Oak Drain District* v. *Keefe*, 87 F. (2d) 786, that under the law of Michigan courts are without jurisdiction in suits *in personam* to make decrees binding upon strangers (*Kinner* v. *Spencer*, 257 Mich. 142; *Welch* v. *City of Lincoln Park*, 268 Mich. 440), and that no decree or judgment can be *res judicata* in another suit unless there be identity of issues and parties. *Leroy* v. *Collins*, 165 Mich. 380; *Jacobson* v. *Miller*, 41 Mich. 90. As we understand its views, they rest upon (1) Sec. 14, Ch. 10, Act 316, Michigan Public Acts 1923, providing that in any suit brought to set aside any drain tax or in any way attacking the legality of any drain proceedings, the drain commissioner shall be joined as a party; (2) *Godkin* v. *Rutterbush*, 147 Mich. 116, a decision which ordered a suit dismissed where a taxpayer sought to recover a tax paid under protest, but neglected to join the drain commissioner,

in which decision the court expressed its opinion that the legislature passed the statute because the commissioner in a peculiar sense stands as the representative of those who are interested in the drain and in the collection of the tax; and (3) *Kersh Lake Drainage District* v. *Johnson,* 309 U. S. 485.

The first two grounds appear untenable under Michigan law, for as noted above, *Kinner* v. *Spencer* (*supra*), decided on the same day as *Township of Lake* v. *Millar* (*supra*), unqualifiedly denied the power of the court to grant any relief against bondholders, though it set aside taxes levied for a drain in a suit to which the Drain Commissioner was a party. The bill there prayed for an injunction against payment of the bonds, but the court refused such relief, saying: "None of the holders of such bonds were made parties to the suit." If the novel interpretation now placed by the lower court on this statute had appealed to the Michigan court, it is reasonable to suppose that it would have granted such relief. We submit, however, that the Court of Appeals virtually assumed legislative powers over the State of Michigan by placing an interpretation upon the statute which would make it confer a representative capacity upon the drain commissioner, and thus make any decree against him operate as a decree against all bondholders. The statutory provision is clear and explicit and requires no interpretation and the court, in *Godkin* v. *Rutterbush* (*supra*), did not pretend to interpret it. Its explanation of reasons which it supposed prompted the legislature to pass the law cannot be considered an interpretation, for the case called for no enlargement of the express language of the legislature. In Michigan, as elsewhere, the courts follow the rules set forth in *Detroit* v. *Township of Redford,* 253 Mich. 453, 455; (1) if the wording of a statute is unambiguous there is no room for construction; (2) the terms

of a statute cannot be extended by construction beyond the obvious import of its language.

If the statute had expressly provided what the lower court has read into it, it would be invalid (*Wuchter* v. *Pizzutti*, 276 U. S. 13) for one may not be made another's statutory representative for any purposes of a law suit unless provision is made for notifying the absent party.

We submit that the lower court has been misled in its interpretation of *Kersh Lake Drainage District* v. *Johnson*, 309 U. S. 485, and has extended it far beyond the intent of this Court. This Court there was reviewing a judgment of the Supreme Court of Arkansas and was, of course, bound by its interpretation of State law. It was attempting no independent interpretation of the State law and had no jurisdiction to do so. Its sole province was to determine whether the judgment of the State court violated Federal law. Here there is no decision of a Michigan court which ascribes such representative capacity as the lower court has given to the drain commissioner, but on the contrary, the fair inference is that the State court has expressly declined to bind bondholders on any theory of representation by the drain commissioner. *Kinner* v. *Spencer* (*supra*). In the *Kersh Lake* case there had been a prior adjudication of the same cause of action between identical parties in the State court, and the only question before the Supreme Court was whether the ordinary rules as to *res judicata* must yield, where it appeared that the party previously defeated was bringing the second suit in order to obtain funds to pay over to creditors. Here the opinion nullifies well established rules, which deny binding effect to a judgment between other parties on a different cause of action.

While the courts recognize that situations may occur where a party may stand in judgment for another, as in class suits, the rule of virtual representation is never ap-

plied unless it appears that the alleged representative necessarily and probably possessed the same interests as the absent party. The doctrine of virtual representation can never apply where their interests are adverse. *Hansberry* v. *Lee* (*supra*). The interests of bondholders and the drain commissioner here were certainly adverse, for in the case commenced by bondholders in the Federal Court the same commissioner whom the lower court supposed was the bondholders' representative pleaded and did his best to prove that bondholders had no rights.

2. Circuit Court of Appeals did not decide issues in accordance with local law.

We presume that all will agree with the statement in *New England Mutual Life Insurance Co.* v. *Mitchell,* 118 F. (2d) 414: "The respectful attitude toward the local court, where there has been no decision on the precise question before us, is to consider the question in the light of the common law of the state, with a view to reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it." The entire body of state law, both in statutes and court decisions, must be considered in the light of the customary rules of interpretation prevailing in the State. It is important that Federal courts adhere to this principle, otherwise they are giving merely lip service to the doctrine of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

The principal legal issues considered in this section of our brief are all now before the Supreme Court of Michigan in a mandamus proceeding entitled "City of Highland Park, et al, *v.* Clark, et al," No. 41,690. In this suit relators seek to compel the levy and spread of taxes to pay bonds issued for the construction of a project considered in *Village of Oak Park* v. *Van Wagoner,* 271 Mich. 450, one

of the Michigan authorities cited by the Circuit Court of Appeals. Respondents contend that they should not be compelled to take this action, advancing the same arguments used by the Court of Appeals in its decision. We believe that this fact should be called to this Court's attention, as it is likely that it would prefer to postpone action on the petition until the Michigan Court has decided the *City of Highland Park* case. This would accord with procedure in *American Surety Company* v. *Baldwin,* 287 U. S. 156, see note p. 163.

(a) *Rejection by Court of Appeals of local interpretations of Drain Statute as to character of improvement Drain Commissioner was authorized to construct.*

The Michigan statute relating to drains contains no restrictions as to the form they shall take; their location, depth, capacity, methods and materials of construction are within the Commissioner's discretion. *Smith* v. *Carlow,* 114 Mich. 67; *Township of Swan Creek* v. *Brown,* 130 Mich. 382. The statute, as noted above, (appendix, p. 14) specifically authorizes their use for the removal of sewage, and the construction of sewage disposal plants as part of the drain project. The structure under consideration serves all drainage requirements, and contains a sewage disposal plant as permitted by the Michigan law, (appendix, p. 11). On no reasonable basis can it be distinguished from the drains held legal in *Royal Oak Drain District* v. *Keefe,* 87 Fed. (2d) 786; *Kennedy* v. *Dingman,* 272 Mich. 24; and *Detroit Trust Co.* v. *Dingman,* 291 Mich. 170. In *Township of Lake* v. *Millar, supra,* the Michigan Supreme Court was not called upon and did not pass upon the legality of the structure. It merely assumed that it was a sewer, and considered other questions raised.

The Federal courts cannot say that this structure is illegal without pointing to any feature which makes it illegal.

The inclusion of a sewage disposal plant as a part of the project does not make it an illegal structure, for the Michigan law specifically provided that a sewage disposal plant could be made a part of a drainage project, (appendix, p. 14). The presumption that the Drain Commissioner acted lawfully in designing it requires the court to regard it as a legal structure until the contrary is proved. *Village of Clawson* v. *Van Wagoner*, 268 Mich. 148. The last decision of the Michigan Supreme Court, *Detroit Trust Co.* v. *Dingman, supra,* though relating to another drain, interpreted the Michigan Drain Law in its relation to the kind of drainage improvement which should be declared legal. It there quoted the provision authorizing the building of sewage disposal plants, and said because of this provision, "it conclusively appears the Legislature contemplated drains might be constructed for the purpose and with the intent that they should serve also as a means of disposing of ordinary sewage." The Circuit Court of Appeals could not disregard this decision and still decide the case according to Michigan law. The fact that the *Detroit Trust Company* case was decided while this case was pending on appeal did not excuse the Court of Appeals from applying it. *Vandenbark* v. *Owens Illinois Glass Co.*, 311 U. S. 635, 61 S. Ct. 347.

(b) *Rejection by court of appeals of local authorities as to the effect of bond recitals.*

An important question of public and commercial law is here involved. We think that the Court of Appeals has departed from a long line of decisions, particularly of this Court, and the courts of Michigan, in permitting these drain districts to gain an advantage by misrepresentations in their bonds. Hitherto the rule has always prevailed that a public corporation, like private corporations and individuals, is estopped from pleading its own wrong. It is a safe

and salutary rule, beneficial both to investors and the public, for the certainty of its enforcement has in the long run enabled honest public corporations to borrow money for needed improvements, and to extend payment on their obligations, at low cost to their taxpayers. This decision, if followed, must ultimately drive investors to other forms of security involving less risk.

The rule which has long prevailed is accurately stated in Dillon on Municipal Corporations (5th Ed.), Art. 952, as follows:

> "The purchaser (of a municipal bond) is bound to see that there exists legislative power, that is a valid legislative act not in conflict with the state constitution for the issue of bonds, or commercial securities of the municipal, public or quasi corporation, and is bound to notice the contents and recitals in the instrument; but if such bonds are duly executed by the proper officers, and if these officers are by the true construction of the legislative enactment in that regard, invested with the power to decide whether conditions precedent have been performed, and the bonds contain a recital that such conditions have been complied with, or a recital which implies such compliance whether the preliminary conditions consist of facts *in pais* or facts of record—the issue of the bonds under such circumstances, with such a recital, is conclusive against the municipality (if the legislature has not otherwise provided) as to the fact or facts recited or implied in the recital, and estops it in an action by an innocent holder for value, before due, to show the contrary."

A vast number of decisions in the Federal courts, and all States of the Union, support this rule. It is applied without limitation to cases of this kind—*i.e.*, where municipalities have by recitals in their bonds expressly or impliedly represented that they are issued for a lawful purpose, but after their issue attempt repudiation on the ground

that their own representation was false and that the real purpose was unlawful. This precisely is the claim of the districts, their taxpayers and other defendants. They say that the bonds were not issued for a drain, as they represent on their face, but for sewers. To prove this they must point to facts either in the design for the projects, or in the motives of those who participated in the proceedings, and thus contradict their recitals of the due happening and performance of all required conditions precedent and full compliance with the law.

The opinion suggests that this recital is not of a fact, but of a condition of law, but we think that position is untenable. When one represents that he has complied with the law and that there is no condition, thing, or event which would render his act illegal, he necessarily is representing facts, not law. The party to whom the representation is made is not interested in an interpretation of the law, but in assurance that everything has been done, and nothing omitted, from which a claim of non compliance could arise.

Recitals such as these in bonds *bona fide* held have uniformly been held to create an estoppel against pleading and proof of an actual unlawful purpose. McQuillan, Municipal Corporations, Vol. 6 (Revised), Art. 2497, 2502; 19 R. C. L. p. 1018, Art. 311; 44 C. J. p. 1253, Art. 425; 86 A. L. R. p. 1086. The leading case, *Hackett* v. *Ottawa,* 99 U. S. 86, is clearly reasoned and has never been disputed by the court of any jurisdiction. In Michigan the doctrine is announced in four decisions, never overruled or questioned. *Common Council* v. *Schlich,* 81 Mich. 405; *Thompson* v. *Village of Mecosta,* 127 Mich. 522; *Schmid* v. *Village of Frankfort,* 131 Mich. 197, and *Bates* v. *City of Hastings,* 145 Mich. 574.

In the *Schlich* case, the recital was compliance with a law authorizing bonds to provide funds for public improvements, but the real purpose was to grant aid to a railroad.

In a summary of the arguments preceding the opinion, we see that the village contended for the same propositions asserted by the Court of Appeals, but the Michigan court overruled them, saying:

> "If defendant Schlich was a bona fide purchaser without notice of the real object for which these bonds were issued, the village is bound to pay them. This is the only question that can be involved in a suit brought to recover upon these bonds; for they would be void in the hands of those who knew the history of the transaction and the purpose for which they were issued."

The Court of Appeals made no reference to this decision.

In *Thompson* v. *Village of Mecosta* (*supra*), the bonds recited compliance with a similar statute, but actually they were issued to induce an owner of a grist mill to locate it in the village. The Michigan court answered the contention of the village that the bonds were void no matter in whose hands, because emanating from an *ultra vires* act, saying:

> "Was the bond void in the hands of a bona fide holder? This bond purports to have been issued under authority of a law which it mentions, and for the purpose prescribed by the act—a thing that the Village might lawfully do. As a matter of fact it was not issued for such a purpose, but for a private improvement, and upon its face it unquestionably carried a false pretense; but a bona fide purchaser for value had a right to rely upon the statement of the board, appearing in the bond, that it was issued to borrow money under this act for lawful purpose, i. e., public improvements."

To show its complete adherence to the rule estopping the municipality to plead an unlawful purpose inconsistent with the recital, the court cites the leading authorities then in existence, among others the following: *Hackett* v. *Ottawa* (*supra*); *Risley* v. *Howell*, 64 Fed. 453; *Kent* v. *Dana*, 100 Fed. 56; *National Life Insurance Co. v. Board of Education*,

62 Fed. 778; *Coler v. Dwight School Twp.*, 3 N. Dak. 249; *Waite* v. *Santa Cruz*, 89 Fed. 619 (afterwards affirmed in 184 U. S. 302).

In *Schmid* v. *Village of Frankfort* (*supra*), under like circumstances the Michigan court, reversing a judgment for the village, said:

> "It is admitted that the bonds were illegal and void because they were delivered to one Seeley in pursuance of a contract to aid a private enterprise, if they were delivered at all. At the same time they were valid upon their face, reciting that they were made and issued for a lawful purpose (p. 198). * * * Undoubtedly, if the purchasers had been aware of the resolution under which these bonds were issued, it would have been notice of their invalidity; but the evidence indicated that they had no such notice, and that they relied upon the recitals in the bonds, and an accompanying letter from the prosecuting attorney that the proceedings were, upon their face, valid, as to the vote of the electors to issue park bonds. We have held in several cases that one relying upon the recitals in a bond that it was lawfully issued may be a purchaser in good faith."

In *Bates* v. *City of Hastings* (*supra*), suit was instituted by a taxpayer to restrain the city from issuing bonds, alleging that its purpose was to use the proceeds to pay factory bonuses. The Michigan Supreme Court adopted a circuit judge's opinion, in which he said:

> "It may be presumed that the bonds which the bill alleges are about to be issued by the proper city authorities, will be valid on their face and may be disposed of to innocent purchasers. Such bonds in the hands of innocent holders, without notice, are collectible and the city must pay them" (citing the Schlich, Thompson and Schmid cases, supra).

The Court of Appeals also made no reference to this decision. It did, however, refer to the *Thompson* and *Schmid*

cases, but said that they should be disregarded because "the villages themselves took part in a false recital, contrary to facts later sought to be asserted." With utmost respect to the Court of Appeals, we submit that this is an untenable distinction. It is novel because nowhere in the decisions does the Michigan court express this as a ground for its conclusion, and we think it wholly meaningless. The representation was that of the village itself, just as here the representation is that of the drain district. There is no way in which an artificial body can make any recital or representation, or do any other act except through agents. It is not a question of participation, but one of actual responsibility as principal for the act of authorized agents.

The Court of Appeals says that it is the law of Michigan that where the projects are illegal from total lack of authority to construct the projects, bonds issued to defray the expense of such projects are void in the hands of innocent holders. It cites no authority for this strange doctrine, for there is none. No Michigan decision has so held, and it is unreasonable to expect that any should, for it would be contrary to the decisions above quoted. In each of those cases the projects were as illegal as any that could be imagined. Neither the villages nor their officials were acting within any authority or jurisdiction in the project in which they were actually engaged. Public credit was being used in aid of private parties. Projects were being financed which not even the legislature could authorize as municipal enterprises, yet the court said that *bona fide* holding, plus the bond recitals, made the municipality liable.

While no case involving the effect of recitals in drain district bonds has been considered by the Michigan court of last resort, we believe it to be the duty of a Federal court, under *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, to ascertain from all available data what the State law is, and that it should consider any well

reasoned opinion of a court exercising jurisdiction in the State which has been accepted by the bar and litigants. In the early part of the year 1939 Judge Fred M. Raymond, of the Western District of Michigan, in *Baker, et al.*, v. *Ruddiman No. 3 Valley Drain District, et al.*, had before him the precise question as here. The Ruddiman Valley No. 3 Drain District had built a drain and issued bonds therefor. Later the State court, in a taxpayers' suit (see *Norton* v. *Cockerill*, 265 Mich. 405) held the project to be a sewer and restrained the levy of taxes against some properties and a township. In an unreported opinion rendered upon a motion of the drain district to set aside a default judgment, the court said:

> "This matter is before the court upon motion of Ruddiman Valley No. 3 Drain District to set aside its default entered about March 1, 1939, and the default judgment entered against it March 15, 1939. Assuming that defendant has made sufficient showing of excusable neglect in failure to appear and answer to entitle it to an order setting aside the default, there still remains the obstacle that it has not made showing of existence of competent evidence to establish a meritorious defense. See Koen *v.* Beardsley, 63 F. (2d) 595; William Lane, Inc. *v.* Selby Shoe Co., 45 F. (2d) 581; David A. Manville & Co. *v.* Francis Oil & Refining Co., 20 F. (2d) 473; Moore's Federal Practice, sec. 55.03.
>
> "By the answer which this defendant asks leave to file, it denies that plaintiffs have the right to institute this proceeding as a class action. It also avers that the County Drain Commissioner had no jurisdiction or authority in law to assess the lands embraced in the so-called drainage district, for the reason that the construction was not for a drain but for the purpose of a trunk line sanitary sewer.

(We here omit a paragraph dealing with a question as to the court's jurisdiction.)

"The International Typographical Union is a bona fide purchaser of the bonds. Recitals in the bonds certify that they were issued to build a drain pursuant to applicable drain laws and that all acts, conditions and things required to be done precedent to their legality had happened and had been performed in due form and time as required by law. In view of these recitals and upon well established authority, the court is of opinion that this defendant cannot now be permitted to defend upon the ground of invalidity. See Royal Oak Drain Dist. Oakland County, Mich. *v.* Keefe (C. C. A.), 87 F. (2d) 786; Hackett *v.* Ottawa, 99 U. S. 86; City of Defiance *v.* Schmidt (C. C. A. 6), 123 F. 1; Thompson *v.* Village of Mecosta, 127 Mich. 522."

As the defeated party did not appeal and the judgment has been paid, which respondents can easily verify by an inspection of the records of the case, it may be regarded as evidence of State law. It is also evidence that jurists trained in Michigan law regard *Thompson* v. *Village of Mecosta* (*supra*) as a clear expression of Michigan law applicable to the plea of a drain district that it issued its bonds for something other than a drainage purpose.

There is no indication in any Michigan decisions that the Court of last resort disagrees with the general body of Federal law on the subject of bond recitals, or the rule condensed by Judge Dillon, which we have quoted. The rule necessarily implies that to be effective, the issuing officers must "by the true construction of the legislative enactment in that regard, be invested with power to decide whether the conditions precedent have been performed." The master and district judge properly construed the law as conferring implied authority on the drain commissioner.

The report says (194):

"* * * Another important restriction requires that the officials making recitals be the ones logically authorized by statute to determine the truth of the

fact recited. Northern National Bank of Toledo *v.* Porter Township, 110 U. S. 608, 28 L. Ed. 258 (1884); Moore *v.* Hampa, 276 U. S. 536, 72 L. Ed. 688 (1928). The restriction is hardly applicable to the case at bar, since the Drain Commissioner, who certified that the requirements of the Drain Act had been observed, would be the one official, if any, in a position to know whether there had been such compliance and therefore the one impliedly authorized to make the recitals. It does not appear to be necessary for the statute authorizing the issuance of bonds to expressly empower the issuing official to make recitals. See Bernards Twp. *v.* Morrison, 133 U. S. 523, 33 L. Ed. 726 (1890); City of Defiance *v.* Schmidt, supra; Gibbs *v.* School-District, supra. The Michigan case of Portsmouth Savings Bank *v.* Ashley, 91 Mich. 670, 52 N. W. 74 (1892), like the Anthony case, held that the bonds must have been duly executed before an estoppel can be invoked, the bonds in that case having been delivered without authority. The court found it unnecessary, in view of this holding, to discuss the rights of the bondholders against a defense that the bonds were issued for the unlawful purpose of aiding a railroad."

Spitzer v. *Village of Blanchard*, 82 Mich. 234, and *First Wisconsin National Bank* v. *Bessemer Twp.*, 286 Mich. 426, cited by the Court of Appeals, are in harmony with the general rule, and if one refers to the authorities which the former decision incorporates, *Dixon County* v. *Field*, 111 U. S. 83, and *Bernard Twp.* v. *Morrison*, 133 U. S. 523, it is readily seen why they were decided against the bondholders. By the true construction of the legislative enactment, the officers who issued the bonds in those cases were not invested with power to decide whether the particular conditions precedent involved in those cases had been performed. In the *Village of Blanchard* case, the defect was the want of a proper election and excess of the debt limit. The issuing officers had nothing to do with the election, nor

the determination of the assessed valuation to which the debt limit was related. In the *Township of Bessemer* case, authority was incomplete until the State treasurer had issued his certificate of full compliance. These drain bond issues were like the bond issues of the Villages of Mecosta, Frankfort, etc. The officials authorized to issue them were the only officers who could know their own purposes. *Chemical Bank & Trust Co.* v. *County of Oakland*, 264 Mich. 673, also cited by the Court of Appeals, supports petitioners' position, for there the recital was given effect even against the claim of an excess of debt limitation provision of the constitution. The only other Michigan case cited by the Court of Appeals on this subject, *Portsmouth Savings Bank* v. *Ashley*, 91 Mich. 670, bears no relation to the subject, for there the bonds were never delivered. Officers, without any authority from the village council, delivered them without consideration. Of course, there could be no rights founded upon an instrument which never was issued.

With the utmost deference to the Court of Appeals, petitioners complaint is that the court did not consider all the law of Michigan on the subject. By a superficial reading of some decisions, a selection of isolated passages therefrom, and application of unwarranted distinctions against other decisions, it arrived at a conclusion wholly at variance with Michigan law.

(c) *Error of Court of Appeals in holding duties of officers and others in relation to collection of taxes and maintenance of funds dependent upon question of whether a legal drain had been constructed.*

The Court of Appeals treats the obligation of officers and Oakland County, imposed by statute to provide for payment of the bonds, as worthless, unless the bonds from every standpoint are valid (982). If the enforceability of the bonds rests upon the ground of estoppel, the court holds

that no one need recognize them or perform duties in connection with the raising and maintenance of funds for their payment. The court says that since the County and its various officers and boards which must levy and collect taxes did not sign the bonds, they could not be estopped and, therefore, no demand may be made against them for performance of their duties. This involves a strange distortion of legal reasoning.

If bonds are held enforceable against a municipality on the ground of estoppel an indebtedness is adjudicated, and its officials are then required to exert such taxing power as they have to provide funds for the payment of the debt. They are not concerned with the ground upon which the debt is adjudicated. If it were otherwise, there would be no practical benefit to a bondholder in obtaining a judgment upon bonds, where the only basis for such judgment is estoppel. His judgment would be a useless entry upon court records, if it did not afford him a basis for recovery of the amount adjudicated in his favor.

(d) *Error of Court of Appeals in Ignoring Effect of Statute Prohibiting Collateral Attack on the Drain Proceedings.*

In arriving at its conclusion that the districts and the taxpayers could attack in a collateral suit the validity of the drain, the court entirely ignored local statutes and decisions, which if considered would require a decision that the court is obliged to hold these matters foreclosed by failure to follow the statutory remedy of certiorari. The provision of the statute making certiorari the exclusive remedy of those who wish to attack the proceeding (Appendix 8) says in unambiguous language that there shall be no collateral attack, *i. e.* "if no certiorari shall be brought within the time herein prescribed, the drain shall be deemed to have been legally established and the taxes therefor

legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity." Probably the Court of Appeals felt that its view that the rights of bondholders had been barred by a prior adjudication made it unnecessary to consider this point, and naturally petitioners would be obliged to admit that if in some prior suit they had previously litigated their rights as bond holders, failure of the court to consider this point, or its erroneous view thereon, would not entitle them to relitigate. This only serves to emphasize what we have said on the first point in this brief, that the court's determination of the *res judicata* proposition is so essential to the decision that it cannot be regarded as an independent proposition.

This court has many times in the past sustained the validity of municipal bonds, where at the time of their issue judicial interpretations of empowering acts or the State constitution assured purchasers that they were obtaining valid obligations. It refused to adjudge the bonds void, where subsequent decisions placed adverse constructions upon the statute and the constitution. *Douglas* v. *Pike County,* 101 U. S. 677; *Taylor* v. *Ypsilanti,* 105 U. S. 60.

In the former case this court said:

> "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment to the law by means of a legislative enactment."

Many states, as indicated in *Great Northern Railroad Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358, 364, follow the same rule, and Michigan is one of them. *Pittsburgh etc. Iron Co.* v. *L. S. Iron Co.,* 118 Mich. 109, 127; *Donohue* v. *Russell,* 264 Mich. 217, 219.

In the latter case the court said:

> "The effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective and makes the law at the time of the overruled decision, except insofar as the construction last given would impair the obligations of contracts entered into or affect vested rights acquired in reliance on the earlier decisions."

It is true that in *Township of Lake* v. *Millar*, 257 Mich. 135, and *Meyering Land Co.* v. *Spencer*, 273 Mich. 703, the court said that this certiorari provision did not bar the suit because the jurisdiction of the Drain Commissioner was attacked, but that decision was contrary to the interpretations of the section which prevailed when the bonds were issued. The statute, its interpretation, and the expiration of the period for bringing certiorari, were conditions upon which parties necessarily relied in the purchase of their bonds. The interpretations of this clause prior to the issuance of these bonds are clear.

In *Township of Clarence* v. *Dickinson*, 151 Mich. 270, plaintiffs in a collateral suit attacked the legality of a tax, and proved that while it was called a tax for the extension of a drain, it was really a tax for a new drain, and that the commission lacked jurisdiction because the application was not signed by the number of persons required to sign applications for a new drain. Plaintiffs urged that inasmuch as the petition was not signed by the necessary number of qualified persons, the drain commissioner had no jurisdiction and the proceedings were a nullity and could be attacked collaterally. The court overruled this contention, saying:

> "I have no doubt cases may arise to which this law can have no constitutional application. Such a case will be presented if the proceedings before the drain commissioner violate constitutional rights. The fact

that such cases may arise is no reason for declaring the law unconstitutional. It is to be presumed that the legislature intended to enact a constitutional law and not an unconstitutional law (Cooley on Constitutional Limitations, 7th Ed., p. 255), and it should be construed in accordance with this intent. The language of the statute indicates that the legislature intended to go to the limit of its authority, but it is also to be presumed that it did not intend to exceed those limits.

* * * * * * *

"Can the statute have constitutional application to this case? The only reason advanced for saying that it cannot, is this, viz., that equity can afford relief whenever the drain commissioner lacks jurisdiction. It is apparent from the foregoing reasoning that the lack of jurisdiction which will warrant relief in equity must arise from a violation of the Constitution. The objection to the jurisdiction in such cases must be a valid constitutional objection. Such objection could be urged if no notice of opportunity of hearing was given to one whose property was to be taken for the construction of the drain, for he has a constitutional right to such notice, and if that right is disregarded, the proceedings are as to him a nullity. If, on the other hand, the objections to the jurisdiction are not of a constitutional character, it is obvious that the legislature has a right to say how they shall be raised, or, in its wisdom, deprive one altogether of the privilege of raising them.

"The jurisdictional objection raised by complainant is not of a constitutional character. The Constitution does not require the petition to be signed by five property owners liable to assessments for benefits. That requirement is purely statutory. The legislature might have dispensed with it altogether. It therefore possessed ample constitutional authority to declare how objections to its non-observance should be made. It had authority to declare that objections not so raised should be disregarded. It exercised that authority by the statutes under consideration. That statute is therefore con-

stitutional in its application to this case and it prevents complainants maintaining this suit."

This decision was reaffirmed in *Stellwagen* v. *Dingman*, 229 Mich. 159, where collateral attack was made upon drain proceedings and an injunction sought against the collection of a drain tax, because of a defective petition instituting the proceedings. The court said:

> "In Township of Clarence *v.* Dickinson, 151 Mich. 270, wherein the objection was based on a claim that the requisite number of taxpayers liable to assessment for benefits had not signed the petition, it was held that 'the lack of jurisdiction which will warrant relief in equity must arise from a violation of the Constitution.' It was said that—
>
> " 'Such objection could be urged if no notice or opportunity of hearing was given to one whose property was to be taken for the construction of the drain,'
>
> but that there is no constitutional requirement as to the number who shall sign the petition; that the requirement was statutory; that the legislature might provide that objections should be raised in the manner provided by the statute (by certiorari), and that the denial of other remedy was not a violation of constitutional rights. This decision has been quoted from with approval in the more recent cases of Cummings *v.* Garner, 213 Mich. 408, and Heliker *v.* Oakland County, 216 Mich. 593, *and must be accepted as the settled law of this State.* That it is in line with the weight of authority will be seen by a perusal of the note on page 856 of 9 A. L. R." (Emphasis is ours.)

The *Stellwagen* case was decided in 1924, but a short time before these bonds were sold, and there had been no intervening decision. Therefore, as the law stood when these bonds were issued, bondholders were assured that there could be no collateral attack unless through want of notice or fraudulent conduct in respect to hearings a taxpayer

was deprived of a hearing. It could not be said that a taxpayer had a constitutional right not to have a sewer built and to be assessed therefor, because after it became known that taxpayers were asserting distinctions between drains and sewers the statute was amended to specifically authorize the building of sewers, and it was held that this amendment was within the constitutional power of the legislature. *Township of Warren* v. *Engelbrecht,* 251 Mich. 608; *Gray* v. *Dingman,* 279 Mich. 62.

We frankly concede that cases decided after the bonds were issued indicate that a different construction will now be given to the certiorari statute, and if Michigan followed the rule of giving all changes of interpretation retroactive effect, we could not urge this point. But as before noted, that rule is limited so as not to disturb rights which parties have acquired in reliance upon the earlier interpretation.

3. Error of Circuit Courts of Appeals in refusing to restrain use of taxpayers' decree to impede tax collections.

An important question which the Court of Appeals has apparently decided in conflict with the decision of this Court in *Chase National Bank* v. *City of Norwalk,* 291 U. S. 431, and the Court of Appeals of the Eighth Circuit in *Fetzer* v. *Johnson,* 15 F. (2d) 145, relates to the power of a Federal court to restrain by its injunction parties before it from using decrees or judgments they have obtained in courts of concurrent jurisdictions in a manner inimical to parties who properly seek relief before them. This court of appeals, by its decision in the *City of Norwalk* case, evidenced its extreme caution in enjoining parties from making use of a judgment of ouster from the streets of an Ohio city of a public utility corporation, where the mortgagee of the properties and franchises of the corporation had not been given its day in court. It still seems to adhere to the

same theories which caused it to be reversed by this Court.

The district court, we think, properly decided that it had power to enter such personal decrees in favor of and against parties before it, as the rights of such parties required. We think that when a Federal court is called upon to administer equity, and has jurisdiction of the subject matter and parties, it has power to and should exercise its jurisdiction to the fullest extent to settle all matters in controversy and to afford complete relief, unless restrained by some express statutory or constitutional provision. There is no Federal statute which forbids a Federal court to restrain parties in a proper case from taking advantage of a judgment or decree of a court of concurrent jurisdiction. If the bonds are valid, bondholders are entitled to have taxes pledged to their payment, and such taxes as may subsequently be levied enforced. The court's jurisdiction does not cease with a mere judgment in favor of bondholders. It continues to afford such relief as may provide for payment. *Riggs* v. *Johnston County*, 6 Wall. 166; U. S. v. *Council of Keokuk*, 6 Wall. 514. We submit that if the bonds are valid on any ground, and if bondholders are not barred by prior adjudication, they are entitled to injunctions restraining taxpayers who are parties to the suit from impeding officials from levying and enforcing the taxes. Such injunctions are not issued against other courts, but against parties who threaten wrongful use of such judgments and decrees.

Conclusion.

The first and third propositions advanced in this brief, being comparatively simple questions of Federal law and vitally affecting the rights of all citizens, ought, we think, to be specifically decided by this Court. The second proposition may only be considered of importance in this Court

in so far as it appears that the Court of Appeals departed from a proper course of action which a Federal court should follow in administering State law. It is discussed in this brief because it is necessary to completely present bondholders' case. If the Court is reluctant to fully consider this proposition, we think a just decision will finally be reached if the Court of Appeals is reversed on the first and third points, and the case remanded with directions to fully consider all applicable local law relating to the second point.

We again call the Court's attention to the fact that the same legal issues decided by the Court of Appeals are now before the Supreme Court of Michigan awaiting decision. (See *ante*, page 14.)

We, therefore, submit that the accompanying petition for a writ of certiorari ought to be granted.

DAVID M. WOOD,
Business Address:
48 *Wall St., New York, N. Y.;*
RAYMOND J. DYKEMA,
Counsel for Petitioners,
2746 *Penobscot Bldg.,*
Detroit, Mich.

APPENDIX.

Portions of the Michigan Drain Law Applicable to Case.

This appendix is intended to furnish a guide for the court to applicable portions of Michigan drain statutes. It omits chapters relating to inter-county drains and portions inapplicable to this and the three companion cases covered by the opinion of the Circuit Court of Appeals, directing entry of decrees which are sought to be reviewed. The codification of Michigan statutes relating to drains is Act 316, Public Acts of Michigan 1923. This was amended in some particulars by Acts 365 and 331 of the Michigan Public Acts of 1925 and 1927, respectively. At the beginning of each section we indicate the year in which the section was enacted. Unless otherwise indicated, the section remained in that form during succeeding years material to these cases.

Ch. I, Sec. 2 (1925) The word "drain" whenever used in this act shall be deemed to include any water course or ditch, opened or proposed to be opened, and improved for the purpose of drainage, and any artificial ditch or drain levee, dyke or barrier, or tile drain proposed or constructed for such purpose, structures and such mechanical devices as will properly purify the flow of such drains.

Ch. III, Sec. 1 (1923) Before a commissioner takes any action on any application to locate, establish and construct any drain, there shall first be filed with him an application to lay out and designate a drainage district with reference to a proposed drain therein; such application shall describe such proposed drain by its starting point, its general direction and terminus. The application shall be signed by not less than ten freeholders of the township or townships in which such proposed drain, or the proposed lands to be drained thereby, may be situated: Provided, That one-half of said signers shall be owners of land liable to an assessment for the construction of such proposed drain: Provided Further, If it shall appear upon filing an application to lay out and designate a drainage district that said district might not include ten freeholders whose lands would be

liable for such assessment, in such case such application shall be received if signed by any freeholders liable to an assessment for the construction of such proposed drain. The eligibility of the signers to such application shall be determined by their interest of record in the office of the register of deeds, in the probate court or in the circuit court of the county in which such lands are situated at the time such application is filed.

(A slight change in this section was made in 1927, not material to this case.)

Ch. III, Sec. 2 (1923) Upon receipt of such application for new drainage district, the commissioner shall immediately cause a survey of such proposed drain to be made by a competent surveyor or engineer: Provided, That if the application shows, or it shall be determined after the survey, that any such proposed drain will traverse more than one county or will affect lands liable for assessment for benefits in more than one county, said commissioner shall proceed under the portions of this chapter relating to inter-county drains. If upon such survey, or if before such survey is made, the commissioner shall determine that the proposed drain is impractical, he shall take no further action thereon but shall, in writing, notify the person or persons who delivered such application to him, of that fact, and his reasons for making such determination. If upon such survey the said commissioner shall determine such proposed drain to be practical, he shall lay out a drainage district, including therein all tracts or parcels of land, highways, townships and cities which would be benefited by the construction of such proposed drain, and which would be liable to an assessment therefor, should such drain be constructed as hereinafter provided.

Ch. III, Sec. 4 (1923) The commissioner shall thereupon prepare his order designating a drainage district so laid out and give it a name or number and describe therein the several tracts and parcels of land, highways, townships, and cities which would be benefited by the construction of such proposed drain and would be liable to assessment therefor. Also a description of the drain proposed in such application

showing its beginning, route, terminus, width, depth, yards of earth necessary to be removed in such proposed construction, and the estimated cost of such construction. The order designating such drainage districts, together with the application therefor, shall thereupon be filed in the office of the county drain commissioner of the county in which such drainage district is situated. The commissioner shall give notice of filing such order designating a drainage district by publishing a notice once in each week for two successive weeks in a newspaper, or newspapers, of general circulation in the county in which such district is situated, which notice shall give a general description of the route of the proposed drain as shown by the survey, and the names of the freeholders whose lands would be traversed thereby.

(A slight change in this section was made in 1927, not material to this case.)

Ch. IV, Sec. 1 (1923) After a drainage district has been established and the order therefor filed with the county drain commissioner, a petition to locate, establish and construct a drain may be filed with the commissioner having jurisdiction of the lands designated in such order as would be benefited by such construction. Such petition shall ask for the location, establishment and construction of a drain which will properly drain the lands described in such order. The petition shall be signed by a number of freeholders in said drainage district whose lands would be liable to an assessment for benefits equal to one-half of the number of freeholders whose lands would be traversed by said drain. The eligibility of the signers to such petition shall be determined by their interest of record in the office of the register of deeds, in the probate court or the circuit court of the county in which such lands are situated, at the time such petition is filed. Such petitioners shall be jointly and severally liable for all costs and expenses for the filing of such petition in case the proceeding shall be dismissed. If the persons signing such petition shall refuse to pay such costs and expenses, the commissioner shall bring suit in a court of competent jurisdiction and collect such costs and expenses. If the financial responsibility of petitioners shall

upon the filing, or thereafter, be determined insufficient, additional signatures may be required or such security furnished as will be approved by the commissioner.

Ch. IV, Sec. 2 (1923) Upon the filing of such petition, the commissioner authorized to act thereon shall as soon as practicable thereafter serve upon the judge of probate of the county a copy of said petition. Within fifteen days after the service of said notice upon him it shall be the duty of the judge of probate so notified to appoint a board of determination, to call a meeting thereof at some place to be designated by said judge and which shall be as centrally located as possible within the drainage district, giving notice of the time and place of such meeting, and the said judge shall cause a copy of such notice to be published for not less than one week in a newspaper published and in general circulation in the county. The said board of determination shall be composed of three members each of whom shall be the supervisor of a township within such county into which the drainage district does not extend. At the time and place fixed in said notice said board shall meet, elect a secretary and proceed to determine the necessity of said proposed drain and whether the same is necessary and conducive to public health, convenience and welfare. At such meeting all persons owning lands liable to assessment for benefits, or whose land shall be crossed by said drain, or any district or municipality affected, may appear for or against said drain proceeding. After hearing the evidence so offered as herein provided, the board shall make their determination upon the necessity of such drain and whether the same is necessary and conducive to public health, convenience and welfare.

If the said board shall find by a majority vote of the whole number of members present and voting thereon that the said drain is not necessary or conducive to public health, convenience or welfare, they shall file with the Commissioner an order dismissing the petition and no further petition for said drain shall be entertained within one year after such determination. If said board by a majority vote, as aforesaid, shall find the said drain so proposed to be necessary and conducive to the public health, convenience

and welfare, they shall make their order to that effect and file the same with the said commissioner.

Upon the receipt of the order of said board, the commissioner shall make his first order of determination in writing, giving the name or number of the drainage district, and shall establish the commencement, route, and terminus of said drain and the width, depth and length thereof, a copy of which order he shall within five days file in his office.

(A slight change in this section, relating to the number of persons who should constitute the board of determination, was made in 1927. The balance of the chapter relates to procedure to obtain right-of-way.)

Ch. VI, Sec. 1 (1925) Upon the release of the right of way and damages, or upon the determination and return of the special commissioners, the commissioner shall make his final order of determination establishing the drain, which drain shall be divided into convenient sections for the letting of contracts. A certified copy of said order of determination shall be filed with the county drain commissioner within five days after such order is made. He shall before the day of letting and review apportion the per cent of the cost of construction of such drain which any township or city traversed or benefited thereby shall be liable to pay by reason of the benefit to the public health, convenience or welfare, or as the means of improving any highway under the control of such township or city. He shall apportion the per cent of the cost of construction of such drain which any highway then under the control of the state, county or township highway commissioners shall be liable to pay by reason of benefits therefor, and he shall also apportion the per cent of benefits to accrue to any piece or parcel of land by reason of the construction of such drain and above the per cent apportioned to any township or city at large or to any highway, as above provided. Such per cent so apportioned when finally approved shall be assessed against such township, cities, highways and lands according to such apportionment of benefits as hereinafter provided. The apportionment of benefits so made shall be subject to review and correction and may be appealed from as in this chapter provided. The board of

supervisors at its October meeting of each year shall make provision by proper assessment of the amounts apportioned against any highway under control of district highway commissioners and any highway under control of county highway commissioners.

(A slight change was made in this section in 1927 in relation to assessments against municipalities.)

Ch. VI, Sec. 4 (1925) The commissioner shall give notice for the holding of a public meeting, at which a review will be had of the apportionment of benefits made as aforesaid and also for the purpose of letting a contract or contracts for the construction of such drain. Notice of such hearing shall be given by publishing a notice thereof, at least two insertions in some newspaper published and of general circulation in the county, if there is one. Such notice shall be so published at least once not less than ten days prior to the hearing. The commissioner shall also give notice of such hearing by posting notices thereof in five conspicuous and public places in each township where the district is located, within the limits of said districts at least ten days prior to such hearing: Provided, That in all cases where the apportionment of benefits shows less than one hundred descriptions upon which benefits have been apportioned, personal service shall be had upon all resident land owners within the drainage district, at least ten days prior to such hearing. As to all other land owners, notice shall be given by posting and publication as above provided. Such notice shall also be personally served upon the supervisor of each township affected, the mayor of each city and upon the chairman of the highway commissioners having charge of any highway apportioned a per cent of the cost of such construction. Such notice shall contain the names of all cities, townships or highways affected. Such notice shall contain a description of the several tracts or parcels of land constituting the special assessment district of such drain: Provided, That it shall not be necessary to subdivide any tract or parcel beyond the point where the whole thereof is within such drainage district or to describe the said drain further than by reference to it by its name or number, and it shall also state the number and length of

sections; the average depth and width of each section; and in case of tile drains, the amount and specifications of all tile required; the location, number, type and size of all culverts and bridges and the conditions upon which the said contract or contracts will be awarded; and in no case shall said notice contain the minutes of survey or table of cuttings which shall be kept on file in the office of the drain commissioner and be open to inspection at the time and place of such letting, and that at the time and place of such letting, or at such other time and place thereafter to which the county drain commissioner may adjourn the same, the apportionment of benefits and the lands comprised within the special assessment district shall be subject to review for at least one day; such review shall be held open from nine o'clock in the forenoon until five o'clock in the afternoon. On such reviews the supervisor or commissioner of highways of any township may appear on behalf of such township. The mayor or some officer of the city designated by him may appear for such city, and any district or county road commissioner may appear on behalf of such district or county. At such review the county drain commissioner shall hear the proofs and allegations of all parties interested, and shall carefully reconsider and review the description of land comprised within the special assessment district, the several descriptions and appointment of benefits, and define and equalize the same as may seem just and equitable. Whenever an apportionment of benefits shall be made against a state trunk line highway, the drain commissioner shall at least twenty days before the review thereon notify by registered mail the state highway commissioner of the percentage apportioned against such highway and the date and place fixed for the review of all apportionment of benefits. If the state highway commissioner desires to have such apportionment of benefits reviewed by the state commissioner of agriculture, he shall within ten days from the receipt of such notice, file with the drain commissioner an objection to the apportionment. The drain commissioner shall then notify the state commissioner of agriculture of the day and place fixed for such review of apportionments and at such meeting the commissioner of agriculture or some deputy selected by him, shall review the apportion-

ment made against the said state trunk line highway, listen to the proofs and allegations of the parties and may view the highway benefited, and his action and decision, thereon, reduced to writing shall be final.

(Slight changes made in this section in 1927, relating to service and publication of notice.)

Ch. VI, Sec. 11 (1923) The proceedings in establishing any drain shall be subject to review upon certiorari, as herein provided. Notice of such certiorari shall be served upon the commissioner within ten days after the copy of the final order of determination of such commissioner in establishing any drain has been filed in his office as provided in section one of chapter six in the same manner as notice is required to be given of certiorari for reviewing judgments rendered by justices of the peace, and the writ shall be issued and served, and bond given and approved and the subject matter brought to issue in the same time and manner, as near as may be, as in such cases provided, except that such certiorari may be heard by the court during term, or at chambers, upon five days' notice given to the opposite party; and the circuit court of the county shall hear and determine the same without unnecessary delay, and if any material defect be found in the proceedings for establishing the drain, such proceedings shall be set aside. If the proceedings be sustained, the party bringing the certiorari shall be liable for the costs thereof, and if they be not sustained, the parties making application for the drain shall be liable for the costs. If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established, and its legality shall not thereafter be questioned in any suit at law or equity: Provided, No court shall allow any certiorari questioning the legality of any drain by any person unless notice has been given to the commissioner in accordance with the provisions of this chapter: Provided further, That when such proceedings are brought, the commissioner shall postpone the letting of contracts and all other proceedings until after the determination of the court. And if any error be found in the proceedings, the court shall direct the commissioner

to correct such error or errors and then proceed the same as though no error had been made.

(Slight changes made in this section in 1927, relating to procedure where errors occur after the final order of determination.)

Ch. IX, Sec. 3 (1923) Whenever the amount assessed for the construction of any drain shall not be sufficient to complete the same, and to pay all the costs and incidental expenses or to pay the principal and interest on bonds if such are issued, a further assessment shall be made to meet the deficit or additional expense. Such further assessment shall be apportioned, assessed, levied and collected as provided in the first instance, and on the same percentage, and shall be collected in one year, but there shall be no review of nor appeal from such further assessment.

Ch. X, Sec. 1 (1923) Within ten days after the letting of contracts, or in case of an appeal, then forthwith after such appeal shall have been decided, the commissioner shall make a computation of the entire cost of such drain which shall include (1) all the expense of laying out and designating the drainage district, which item of expense shall include the entire cost of the survey; (2) the expense of locating, establishing and constructing the drain; (3) the fees and expenses of special commissioners; (4) the compensation to be paid the board of review; (5) the cost of construction of bridges and culverts; (6) the contracts for the construction of the drain, or other work to be done on said drain; (7) the estimated cost of an appeal in case the apportionment made by the commissioner shall not be sustained; (8) the expenses of the state commissioner of agriculture, where called; (9) the cost of publishing all notices required; (10) and all fees of the probate judge, and he shall add the whole into a gross sum and add thereto five per cent of said gross sum to cover contingent expenses and the entire sum so ascertained shall be deemed to be the cost of construction of such drain.

Ch. X, Sec. 2 (1923) The Commissioner shall thereupon make a special assessment roll for such drain for each township, city or highway affected thereby, which roll shall be

designated "(giving the name) drain special assessment roll," and he shall enter therein a correct description of the tracts, parcels or subdivisions of land benefited by such drain and place opposite each description the amount of the per cent heretofore determined upon by him or by the board of review, as the case may be. He shall also enter thereon the amount of the per cent apportioned to such township, city or highway, and in case such amount be payable in installments, he shall also enter thereon a memorandum of the installments thereof and of the year or years when such installments shall be spread; and shall add a certificate in writing of the determination whether the taxes assessed for benefits shall be paid in one or more years. Such rolls shall be dated and signed by said commissioner and filed on or before the last Wednesday in September in each year, in the office of the county clerk.

(Slight changes in procedure were made in a 1927 amendment to this section.)

Ch. X, Sec. 5 (1923) All drain taxes assessed under the provisions of this act shall be subject to the same interest and charges, and shall be collected in the same manner as state and other general taxes are collected, and collecting officers are hereby vested with the same power and authority in the collection of such taxes as are or may be conferred by law for collecting general taxes. Drain taxes, when collected, shall be returned to the county treasurer to be disbursed by him. In all cases where suit is brought against the collector arising out of the collection of any drain tax, the county shall defend such officer in the same manner that he has now the right to be defended in the collection of general taxes. No suit shall be instituted to recover any drain tax or money paid or property sold therefor, or for damages on account thereof, unless brought within thirty days from the time of payment of such money to, or sale of such property by, the collecting officer; and if such tax shall be paid under protest the reasons therefor shall be specified, and the same procedure observed as is or may be required by the general tax law. All taxes levied under the provisions of this act, with all lawful costs, interest and charges, shall be and remain a perpetual lien upon

the lands upon which they are assessed, and a personal claim against the owner or owners of such lands until they are paid.

Ch. X, Sec. 6 (1923) If the taxes levied for the construction, cleaning out, widening, deepening, straightening, or extending of any drain are not collected by the township or city treasurer, they shall by him be returned, together with the lands upon which they were levied, to the county treasurer in the same return, at the same time, and in the same manner, in every respect (naming in each case the particular drain), as lands are returned for state, county and township taxes, and such taxes shall follow such lands, the same as all such other taxes, and all the general provisions of law now existing, or that may be hereafter enacted for enforcing the payment of township, county and state taxes, shall apply to such drain taxes, and to the lands returned delinquent therefor, in the same manner and with like effect.

Ch. X, Sec. 14 (1923) In any suit brought to set aside any drain tax, or in any way attacking the legality of any drain proceedings, the commissioner shall be made a party to said suit.

Ch. X, Sec. 15 (1925) In cases where the commissioner determines that the taxes assessed for benefits received shall be collected in more than three installments, said commissioner may borrow money in anticipation of the collection of all installments after the first and may issue as evidence thereof the bonds of the drainage district as hereinbefore defined. Such obligations shall specify on their face that they are payable out of the installments of drain taxes to be thereafter collected, and the amount thereof shall not exceed the aggregate of the installments levied exclusive of the first installment. Bonds issued hereunder shall be signed by the commissioner on behalf of the drainage district, shall be countersigned by the county clerk and shall be payable at such time or times, not exceeding ten years from the date thereof, as may be determined upon by the commissioner or as may be required by the date of maturity of the installments levied, it being the intent hereof that the dates of maturity of obligations issued hereunder shall be as nearly identical as is practicable with the collection of

the installment of drain taxes. (Provided that in cases where the estimated cost of any drain exceeds ten dollars per running foot, the drain commissioner may in his discretion determine that bonds issued hereunder may be made payable in not to exceed fifteen years from the date thereof). The commissioner shall prescribe the form of the bond and shall therein pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities and highways assessed at large, in the proportion that they are taxed for the benefits received thereby. In no case shall such bonds be sold for less than par and accrued interest. If any premium is received thereon such premium shall belong to the fund of the drain. The commissioner may make payment or partial payment of the cost of the drain in such bonds, or may sell part or all thereof, depositing the proceeds in the county treasury to the credit of the drain fund, to be disbursed as herein provided. The county treasurer shall safely keep all such bonds until sold as above provided.

Ch. X, Sec. 15 (1927) In cases where the commissioner determines that the taxes assessed for benefits received shall be collected in more than one installment, said commissioner by and with the written approval of the judge of probate and the county treasurer of the county, may borrow money in anticipation of the collection of such installments and may issue as evidence thereof the bonds of the drainage districts as hereinbefore defined. Such obligations shall specify on their face that they are payable out of the installments of drain taxes to be thereafter collected, and the amount thereof shall not exceed the aggregate of the installments levied. Bonds issued hereunder shall be signed by the commissioner on behalf of the drainage district, shall be countersigned by the county clerk and shall be payable in annual installments equal in number to the installments of taxes, shall mature not earlier than March first nor later than June first of the year following the due dates of the respective installments of taxes. The number of installments shall not exceed fifteen and the amount of each installment shall be fixed by the commissioner to correspond as near as may be to his estimate of the amount of taxes actually collectible each year. The commissioner

shall prescribe the form of the bond by and with the written approval of the judge of probate and the county treasurer of the county shall therein pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities, villages, counties and state trunk line highways assessed at large, in the proportion that they are taxed for the benefits received thereby: Provided, That the written consent as above set forth of any judge of probate or county treasurer shall not be required in proceedings relating to inter-county drains. Such bonds shall be advertised and sold by the drain commissioner after the manner provided for the advertisement and sale of municipal bonds by act number two hundred seventy-three of the laws of nineteen hundred twenty-five and any amendments which may be made thereto governing such advertisement and sale. If any premium is received thereon such premium shall belong to the fund of the drain. The proceeds derived from the sale of such bonds shall be deposited with the county treasurer to the credit of the drain fund. The county treasurer shall safely keep all such bonds until sold as above provided. In case the amount available in the drain fund shall be insufficient to pay the principal or interest of any such bonds heretofore or hereafter issued when they become due the same shall be advanced and paid by the county out of its general funds and reimbursement to said general fund shall be made out of the drain taxes thereafter collected, provided that such advancement by the county shall not cause the total debt of the county to exceed the constitutional limitation thereof.

Ch. X, Sec. 16 (1923) In cases where bonds are issued and sold by the commissioner all installments of the drain taxes subsequent to the first installment shall bear interest at the rate of six per cent per annum from the date of the preparation of the assessment roll until due. Such bonds may provide, if the commissioner so determines, for the payment of interest semi-annually. All of said subsequent installments and the interest thereon shall, as collected, be paid into the county treasury and there placed to the credit of the fund of the drain to be used solely for the payment of bonds as the same shall mature. All moneys thus collected in anticipation of the maturity of the bonds shall be depos-

ited by the county treasurer in a bank or banks to be designated by the board of supervisors of such county and the interest received shall belong to the fund: Provided, however, That any bank receiving county drain funds hereunder shall give bond to the county treasurer in an amount not less than the sum so deposited.

Ch. X, Sec. 18 (1923) If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature to pay the same with interest, it shall be the duty of the commissioner to at once levy an additional assessment as hereinbefore provided in such an amount as will make up the deficiency. Any surplus remaining after the payment of the bonds and interest shall remain in the county treasury and be used for the maintenance of the drain.

Ch. XVII, Sec. 5 (1925) Any county drain may be used for sewage disposal by any city, village or township for which it shall be available, but shall be kept cleaned out or enlarged as the county drain commissioner may determine to be necessary for the carrying off of the sewage and the natural flow of said drain at the expense of the city, village or township using the same, and if used by more than one, the expense to be borne by each shall be determined by the board of supervisors. Disposal plants, filtration beds and other mechanical devices as will properly purify the flow of any drain may be constructed and become a part of any established drain, the cost of construction therefor to be paid for in the same manner as other drainage costs as in this act provided. Such plants, beds, or devices may be described in the petition for the location, establishment and construction of drains or in the petition for the cleaning, widening, deepening, straightening or extending of drains, or in the application for the laying out of a drainage district. Petitions for the construction of such plants, beds and devices for use on any established drain may be filed by the same persons and shall be received and all proceedings had thereon in the same manner as other petitions for any drainage construction under this act. Plans and specifications for the construction as part of a drain of any disposal plant, filtration bed or other mechanical device to

properly purify the flow of such drain shall be prepared, subject to the approval of the state commissioner of health, and shall be filed with the drain commissioner. Contracts for such construction shall be let in the manner provided in chapter eight of this act. To meet the cost of such construction the drain commissioner shall apportion the per cent of such cost among the several parcels of land, highways and municipalities benefited thereby. The costs and charges for maintenance shall be apportioned and assessed each year. In case the apportionment shall be the same as the last recorded apportionment, no day of review shall be necessary, but in case the apportionment shall be changed, notice of a day of review shall be given to such persons or municipalities whose percentage has been raised. Lands may be acquired as a site for the construction of such plants, beds and devices, and releases thereof may be obtained in the same manner as other lands for right of way as in this act provided.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile-Halfway Drain District of Macomb County, Michigan,

Petiitoners,

v.

NINE MILE - HALFWAY DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan; CARL B. BRANDENBURG, County Treasurer of Macomb County; GUY L. BROWN, County Clerk of Macomb County; BERT ENGELBRECHT, Drain Commissioner of Macomb County; SHERWOOD BENNETT, Comptroller of Macomb County; BOARD OF SUPERVISORS OF MACOMB COUNTY; TOWNSHIP OF LAKE, a municipal corporation; TOWNSHIP OF WARREN, a municipal corporation; TOWNSHIP OF ERIN, a municipal corporation; CITY OF EAST DETROIT, a municipal corporation; VILLAGE OF CENTERLINE, a municipal corporation; ALFRED FOERSTER, CHRIST F. KAISER and HENRY JACOBS, Taxpayers, and ALEXANDER L. WALTENSPERGER and NELLIE WALTENSPERGER, Taxpayers,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

ALEX. J. GROESBECK,
1801 Dime Bank Building,
Detroit, Michigan,
BERT V. NUNNELEY,
Mount Clemens, Michigan,
Counsel for Respondents.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

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IN THE

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OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile-Halfway Drain District of Macomb County, Michigan,

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NINE MILE - HALFWAY DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan; CARL B. BRANDENBURG, County Treasurer of Macomb County; GUY L. BROWN, County Clerk of Macomb County; BERT ENGELBRECHT, Drain Commissioner of Macomb County; SHERWOOD BENNETT, Comptroller of Macomb County; BOARD OF SUPERVISORS OF MACOMB COUNTY; TOWNSHIP OF LAKE, a municipal corporation; TOWNSHIP OF WARREN, a municipal corporation; TOWNSHIP OF ERIN, a municipal corporation; CITY OF EAST DETROIT, a municipal corporation; VILLAGE OF CENTERLINE, a municipal corporation; ALFRED FOERSTER, CHRIST F. KAISER and HENRY JACOBS, Taxpayers, and ALEXANDER L. WALTENSPERGER and NELLIE WALTENSPERGER, Taxpayers,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

CONCISE STATEMENT OF THE CASE

A Writ of Certiorari is sought to review an order of the Circuit Court of Appeals, 119 Fed. (2d) 157, reversing a District Court judgment (R. 220-233), which judgment was

entered after overruling exceptions of petitioners (R. 211-216) and respondents (R. 204-211) to a report of a Special Master (R. 148-203). We find it necessary to point out inaccuracies and omissions in opposing counsel's statement of the case. Petitioners excepted to the Master's Report on the ground that the primary purpose of the project was drainage and that the project was a legal project under the applicable laws of the State of Michigan (R. 212-213) and that petitioners were entitled to the independent judgment of the Federal Court as to the character of the project without regard to the prior adjudication of the Michigan Court (R. 214). Not only had the Michigan Supreme Court decreed the entire proceedings and the project to be illegal and void (R. 25), but, as appears from the records in this case, the Special Master in his report, the District Judge in overruling petitioners' exceptions, and the Circuit Court of Appeals in its opinion determined the proceedings and the project to be illegal under Michigan law. The Special Master and the District Court held that petitioners were not bound by the decision of the Michigan Supreme Court in the case of the *Township of Lake v. Millar,* 257 Mich. 135, where these identical proceedings were decreed illegal and void by the state court because bondholders were not named as party plaintiffs or defendants in that case, and further that even though the project and the proceedings were illegal under Michigan law the respondents were estopped by the recitals in the bonds to deny their validity. The Circuit Court of Appeals reversed the District Court on its findings as to the legal effect of the Township of Lake case and further held that the respondents were not estopped to deny the validity of the bonds because the Federal Court was bound to follow the state law, and that under the state law the proceedings, of which the bonds are a part, were void because of lack of jurisdiction in the Drain Commissioner to do what he attempted to do.

On page 4 petitioners state: "Objection to the payment of the bonds and levy of taxes is based upon a claim that the improvement was designed and built with the intention that it would serve the dual purpose of removing surface water and sanitary sewage, and because of this underlying purpose the Drain Commissioner lacked jurisdiction." The erroneous statement that objection to the payment of the bonds or the defense of the case is based upon a claim that the improvement was designed for a dual purpose, is argumentative and completely disregards the tests of legality consistently applied by the state court and properly applied by the lower court in its opinion (R. 975-988).

The suit was defended on the grounds, first, that the petitioners are bound by the decision and the decree of the Michigan Supreme Court in the case of *Township of Lake v. Millar,* the decision being reported in 257 Mich. 135 and the decree attached to plaintiffs' complaint (R. 25), where this identical project and the proceedings in connection therewith, of which the bonds are a part, are found and decreed to be illegal and void; and second, that even if the petitioners are not bound by said state decision, the project as conceived and constructed was, under the decisions of the state court, an illegal sewer and not a drain or, at best, it was a combined sewer the primary purpose of which was not to furnish drainage facilities as required by the state law but to furnish illegal sewage facilities; that the Drain Commissioner was without jurisdiction, his illegal acts being mere usurpations of authority and, therefore, under the decisions of the state court the recitals in the bonds do not estop respondents from defending against the bondholders upon the ground of the illegality of the project and of the proceedings of which the bonds are a part. The bonds were signed by the Drain Commissioner and pledged the faith and credit of the Drainage District only and were

certified to by the County Clerk. The respondents are: The Nine Hile-Halfway Drain District, the County Treasurer, Clerk, Drain Commissioner, Comptroller and Board of Supervisors, the Townships of Lake, Warren and Erin, the Cities of East Detroit and Centerline and certain individual Taxpayers, and the suit was further defended on the grounds that even if the Drainage District should be held liable on the bonds that respondents other than the Drain Commissioner were not parties to the recitals in the bonds and could not, under Michigan law, be required to pay for an illegal project.

The statement appearing on page 3 of the petition—"A review of any question involving any step in the proceedings is provided by certiorari, * * *" is not complete without a reference to the state court's interpretation of this statute on this and other identical projects and proceedings. A Circuit Judge from an adjoining circuit of Wayne County, Michigan, was called in to hear the Township of Lake case and sustained the contention of counsel for the Drain Commissioner and the County on the technical ground that the Drain Commissioner and others were estopped to deny the validity of the project and the proceedings because of the failure to take the state statutory certiorari proceedings referred to by petitioners. On appeal the Michigan Supreme Court reversed the holdings of the Circuit Court and its findings as to the application of the state certiorari statute on the ground that the proceedings were void because the Drain Commissioner was without jurisdiction, and in such case no estoppel arose against plaintiffs for failure to take the Michigan statutory certiorari proceedings. This holding of the Michigan Supreme Court as to the Michigan certiorari statute referred to by petitioners has been consistently followed, as will more fully appear in respondents' argument.

Petitioners' reference to Act 316 of the Public Acts of 1923, as amended by Section 5, Chapter XVII, Act No. 74 of the Public Acts of 1925, appearing on page 4 of their Petition, fails to include the statement that the State Supreme Court gave full consideration to this provision of the law as it was there presented by special counsel for the bondholders when it held the proceedings illegal and void in the Township of Lake case. (See Vol. 2360 of Michigan Supreme Court Records & Briefs, pp. 26-31). An examination of this section in conjunction with the history of these particular proceedings follows in our argument.

On page 6 petitioners include a portion of the history of the proceedings which makes no reference to the plans and specifications or to the advertisement for bids or the issuance of the bonds which are a part of the proceedings. The advertisement for bids for bonds does, however, appear on page 494 of the Record as a part of the proceedings in the similar companion case, *Petitioners v. Centerline Relief Drain District, et al.,* this Court docket No. 290. Petitioners introduced in evidence Exhibit 1, the plan and profile of the Nine Mile Drain (R. 289) and relied on this exhibit to determine the character of the project (R. 354). Petitioners' statement that the proceedings conform strictly to the Drain Law is erroneous, and the most that can be said is that, as was stated in the statement of the case in the lower court and not objected to by counsel for petitioners, the proceedings in form followed the Drain Law and finally culminated in the levying of assessments, the issuance of bonds and the construction of the project.

Petitioners' statement on page 10 that the lower court refused to consider the case of *Detroit Trust Co. v. Dingman,* 291 Mich. 170, is erroneous, as clearly appears from record page 980 of the lower court's opinion, and so argumentative that we leave the answer thereto to our argument and objections to the Petition.

At the time the project was constructed, there was legal authority for the use of County drains for sewage disposal by municipalities, but there was no statute authorizing the use of County drains for sewage disposal by individuals as was being done at the time this project was constructed and as has been done since the construction thereof. On September 3, 1913, the Attorney General of the State of Michigan, gave an opinion to the Drain Commissioner of Macomb County, introduced in evidence as Exhibit A-3, to the effect that "if private individuals or corporations are using a County drain for sewage disposal without authority, it would be the duty of the County Drain Commissioner to put a stop to such unlawful use" (R. 804, 805).

By agreement of counsel, the Master accompanied by representatives of counsel of record, made a personal inspection of the project and the assessment district. The sewage disposal plant was placed in operation for the purpose of this inspection and a conspicuous amount of sewage was evident both in the disposal plant itself and the adjoining tanks. A personal inspection was made of the outlets of the conduits and these disclosed pronounced evidence of raw domestic sewage. Likewise, an examination was made of the interior of the conduits by entry through manholes and here again the specimen of sewage was such as is found in an urban area.

At the time the proceedings were undertaken and the project constructed the population of the assessment district was in excess of 11,000 (R. 497) and included the City of East Detroit, part of the Villages of St. Clair Shores and Centerline and a settled portion of Warren Township. The entire area, including the existing municipalities, was without sanitary sewage facilities; outhouses were numerous within the municipalities and sewage in the open ditches created a public nuisance (R. 425, 497, 750). The Master's

findings as to the history of the project adjacent to the Detroit area where similar projects had been constructed under the sewer law of the State of Michigan, and the character and manner of construction, is substantially correct and rather than repeat the same we refer to pages 155-163 of the Record.

The project in this case was designed and built so that laterals could follow existing or projected streets or alleys to furnish sewage facilities, and it was conceded by the testimony of all the witnesses that the main trunk sewer could be of no benefit to lot owners other than those immediately adjacent thereto without the construction of laterals (R. 405-407, 415, 417, 510, 511, 619, 802).

This case is one of three cases which involve similar projects and similar legal issues, the testimony of which was taken simultaneously with the testimony in this case, upon which the Master filed a combined report and during the trial of which some exhibits were used in common. Petitions for certiorari have been filed in all three cases, the other two cases being by the same petitioners and in one the Martin Drain and Branches Drain District, et al., respondents, this Court docket No. 289, and in the other, Centerline Relief Drain District, et al., respondents, this Court docket No. 290. It was stipulated by counsel in the lower court (R. 242, 244, 245, 246) that any of the exhibits or testimony in these cases, this Court docket Nos. 289 or 290, would be considered a part of the record in this case and would be referred to in the arguments and briefs.

The lower court settled purely local controversies involving the application of the Michigan decisions to determine the jurisdiction of the Drain Commissioner and the validity of proceedings by the Drain Commissioner which purport to be under Act 316 of the Public Acts of 1923, as amended (a portion of which is attached as an appendix to

the Petition). On the trial of the case petitioners produced an engineer as a witness and introduced in evidence the plan and profile of the project, Exihibit 1, but could not locate the contracts and specifications (R. 288, 289). This witness testified that in his opinion the project was a legal drain, and based his opinion solely on Exhibit 1 and the knowledge of the terrain (R. 354). The testimony of the designing and other engineers was that the project and proceedings were designed primarily to furnish sewage facilities (R. 440, 486, 487, 495-497, 502, 511, 512, 529, 530, 543, 547, 548, 569, 570, 577, 590, 591, 605, 618, 620, 625, 626, 630, 668, 751, 756, 761).

We have recited only sufficient facts to show some of the inaccuracies and omissions of petitioners' statement of the case. These more fully appear in our Argument (pages 9 to 63) and we will not repeat them here.

ARGUMENT

PRELIMINARY STATEMENT

We respectfully submit that the reasons relied upon by petitioners for the allowance of the Writ of Certiorari do not entitle them to the Writ.

1. Petitioners state as their first reason for the allowance of the Writ that due process is denied petitioners by the decision of the Circuit Court of Appeals holding that the decrees in taxpayers' suits in the state courts are *res judicata.* This question was fully briefed and argued by both sides in the Circuit Court of Appeals. This is not a case where a state statute or a state court decision is claimed to have deprived bondholders of their right to due process under the Federal Constitution, but a case where petitioners claim that they have been denied due process of law by the decision of the Federal Circuit Court of Appeals, which held that the bondholders have had their day in court and that the state court decisions are *res judicata.*

The discretion of this Court in granting Writs of Certiorari is exercised sparingly and with caution. *Amer. Constr. Co. v. Jacksonville T. & K. W. Ry. Co.,* 148 U. S. 372, 37 L. Ed. 486; *In re Woods,* 143 U. S. 202, 36 L. Ed. 125. We respectfully submit that the petition for certiorari in this case amounts to a request for a rehearing of the issues already decided by the Circuit Court of Appeals and that petitioners are not entitled to such rehearing. In *5 Cyc. of Fed. Procedure,* paragraph 2638, it is stated:

> "It is clear that the writ will not issue merely to give the defeated party in the Circuit Court of Appeals another hearing nor to review evidence on mere questions of fact." *Magnum Import Co. v. Coty,* 262 U. S. 159, 67 L. Ed. 922.

2. Petitioners state as their second reason for the allowance of the Writ that the Circuit Court of Appeals did not decide issues in accordance with local law. Petitioners themselves admit on page 43 of their Brief that this reason is not a proper one for the allowance of the Writ. Suffice it to say, therefore, that the issues of local law decided by the Circuit Court of Appeals were all fully briefed and argued by petitioners in the lower court and that said issues were decided by the Circuit Court of Appeals in accordance with local law. It now appears that petitioners are seeking a rehearing upon the decision of the Circuit Court of Appeals pertaining to issues of local law, and this rehearing they are not entitled to. *Magnum Import Co. v. Coty, supra.* It has been repeatedly held that on a question of fact the Supreme Court will accept the concurrent findings of the District Court and the Circuit Court of Appeals when supported by substantial evidence. *Kellogg v. Hicks,* 285 U. S. 502, 76 L. Ed. 903; *Texas and N. O. R. Co. v. Brotherhood of Ry. and Steamship Clerks,* 281 U. S. 548, 74 L. Ed. 1034, and *Virginia Ry. Co. v. System Federation No. 40,* 300 U. S. 515, 81 L. Ed. 789.

3. The Circuit Court of Appeals has not decided the question of the power of Federal Courts to restrain action to enforce actions of concurrent courts in a way probably in conflict with the decision of the Circuit Court of Appeals, Eighth Circuit, in *Fetzer v. Johnson,* 15 Fed. (2d) 145, or in conflict with the decision of this Court in *Chase National Bank v. City of Norwalk,* 291 U. S. 431. In the case at bar the Circuit Court of Appeals did not decide that if the bonds were for any reason held to be valid that the injunction of the state courts enjoining the collection of taxes could not be overridden. The Circuit Court of Appeals made no finding upon this question one way or the other, as may be readily seen from an examination of the Opinion

of the Circuit Court of Appeals. Moreover, the contention of petitioners on this point is controlled by the decisions in the case of *Erie Rd. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, and in *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202, 82 L. Ed. 1290, in which latter case this Court held:

> "As to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari by the Supreme Court of the United States, as the conflict may be merely corollary to a permissible difference of opinion in the state courts."

I.

PETITIONER'S RIGHT TO RECOVERY IS FORECLOSED BY THE DECISION AND DECREE OF THE MICHIGAN SUPREME COURT IN THE CASE OF TOWNSHIP OF LAKE v. MILLAR

In the case of *Township of Lake v. Millar,* 257 Mich. 135, the Michigan Supreme Court in passing upon the same proceedings now under consideration by this Court, held as follows:

> "The question is presented whether a petition for a drain confers jurisdiction upon the drain commissioner to build a sewer, whether a petition to the drain commissioner to do something within the scope of his authority confers jurisdiction upon him to do something wholly without the scope of his authority; whether a petition to do something he has a right to do confers jurisdiction upon him to do something which he has no right to do; whether upon filing a petition for a drain which he has a right to build, the commissioner may lay out and construct a sewer which he has no right to build? A drain commissioner may not, by mere assumption of authority, legally do that which he has no authority to do. If, upon a petition to do

what he has a right to do, he may do what he has no right to do, the extent of his authority is measured by his own acts and conduct and not by law. The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority. The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari, but AN ENTIRE WANT OF JURISDICTION MAY BE TAKEN ADVANTAGE OF AT ANY TIME. The drain commission had no jurisdiction to construct a sewer any more than to construct a Covert road. No one will contend that if the drain commissioner, when the petition for a drain was filed with him, had laid out an assessment district, established and constructed a Covert road, the plaintiffs would have been without remedy. The same legal question is here presented. THE PROCEEDINGS ARE VOID FOR WANT OF JURISDICTION." (Emphasis supplied.)

The decree entered pursuant to the opinion provided:

"2. That all proceedings and actions heretofore had and taken by the defendants as set forth in the amended bill of complaint filed in this cause, relative to the survey, location, establishment and construction of the Nine Mile-Halfway Drain, the extension of the outlet thereof, and disposal plant, and all apportionments and assessments made thereon, against the plaintiffs and the lands of said plaintiffs, are decreed to be illegal, unlawful, null and void, and of no effect whatsoever, and said apportionments and assessments be and are hereby cancelled, vacated and set aside, and the said lands of plaintiffs be and are hereby forever discharged of and from the apparent lien thereof.

"3. That the defendant Thomas F. Simms, treasurer of Macomb County, Michigan, and his

> successors in office, be and are hereby perpetually enjoined and restrained from collecting or attempting to collect any of the assessments levied against the said respective plaintiffs, or the respective parcels of land taxed or assessed against them in the tax roll for the location, establishment and construction of said Nine Mile-Halfway Drain and disposal plant, and from selling or attempting to sell any of the property of said plaintiffs for nonpayment of the said assessments. No costs will be awarded herein."

With reference to the binding effect of this decision on the Federal Courts the Circuit Court of Appeals properly held that the decrees in the State cases "construing as they do the Michigan County Drain Law, are binding upon this Court. Rulings of State Courts construing state statutes were binding upon Federal Courts prior to the announcement of *Erie Railroad Company v. Tompkins,* 304 U. S. 64. Certainly since that decision the Federal Courts are governed by state law to a greater extent than formerly. * * *"

The present contention of Petitioners is that the bondholders are deprived of due process by the decision of the Circuit Court of Appeals holding that the decision of the Michigan Supreme Court in the case of *Township of Lake v. Millar* is *res judicata* of the rights of the bondholders.

The legal issue involved has been clarified by *Kersh Lake Drainage District, et al., v. A. J. Johnson,* 309 U. S. 485, and by the decision of the Circuit Court of Appeals in this case. The important point decided in the Kersh Lake case is that under very similar circumstances and statutes it has been held by this Court that the Drain Commissioners do represent the bondholders. In the Kersh Lake case the Court stated:

"As stated by the Supreme Court of Arkansas, the general jurisdiction of the Lincoln Chancery Court, under the State law, to render the 1931 and 1932 decrees is 'acknowledged,' and this determination by the State's highest court is binding upon us. However, petitioners' argument is that these decrees were void because certificate holders were not made parties in and had no notice of the chancery proceedings. Therefore, they contend that in giving effect to the State court decrees and treating them as *res judicata* in the present proceeding the court below deprived certificate holders of their property without due process of law in violation of the Fourteenth Amendment. Petitioners also add the contention that the 1932 State court decree was 'collusive as a matter of law.'

"Although the Drainage District was not in terms legislatively declared to be a corporation, its powers and limitations were similar to those of corporations and its Commissioners were comparable to corporate directors. Among the duties of the Commissioners—as provided by the very statute upon which the certificates involved here rest—were those of protecting and enforcing creditors' rights on obligations issued by the District. And the Commissioners in 1931 and 1932 litigated with the landowners the disputed question of proportionate amounts of the taxes due the District by virtue of drainage benefits received by the particular tracts here in question.

* * * * *

"These certificate holders were not entitled to be made parties in the Lincoln Chancery proceedings just as in practice creditors of a corporation are not, unless otherwise provided by statute, made parties in a suit between a stockholder and the corporation to determine liability on a stock subscription, between the corporation and a third person to recover corporate assets, or in a suit

> brought against the corporation by creditors, stockholders or officers. It has been held that bondholders are not necessary parties to and are bound by the decree—even if adverse to their interests—in litigation wherein an indenture trustee under a bond issue is a party and exercises in good faith and without neglect his contractual authority to represent and assert the lien securing the issue. And so are these petitioners bound by the decrees in the Chancery suit in which the Commissioners as parties appropriately asserted the lien for benefit of certificate holders—unless there was fraud or collusion.
>
> "It is sufficient to state as to this contention that the issues of fraud and collusion raise no questions which the Supreme Court of Arkansas was not competent finally to decide."

In connection with the language used in the Kersh Lake case by this court it will be noted that the Circuit Court of Appeals held that the drain district in this case is a corporation.

It is apparent that a duty similar to that imposed on the Arkansas Drain Commissioners is imposed upon the Drain Commissioners in Michigan where Section 4936 of the Compiled Laws of Michigan for 1929 provides as follows:

> "Commissioner party to suit. Sec. 14. In any suit brought to set aside any drain tax, or in any way attacking the legality of any drain proceedings, the Commissioner shall be made a party to said suit."

The Michigan Supreme Court has definitely held that the drain commissioner stands as a representative of those who are interested in the drain and collection of the tax, in *Godkin v. Rutterbush,* 147 Mich. 116, where it is stated with reference to the statutory provision quoted above:

> "The obvious reason for the enactment of this provision was that the drain commissioner in a peculiar sense stands as a representative of those who are interested in the drain and in the collection of the tax. The purpose of the statute was to afford to the drain commissioner the opportunity to be heard in the proceeding."

On this point the Circuit Court of Appeals held:

> "There is no essential difference between the statutes of Arkansas and Michigan dealing with this situation. Neither statute provides that the creditors or bondholders shall be made party, the Michigan statute requiring only that in any suit brought to set aside any drain tax or in any way attacking the legality of any drain proceedings, the drain commissioner shall be joined as party to the suit (Section 14, c. 10, Act 316, Michigan Public Acts, 1923). In the Kersh Lake case, *supra*, the Supreme Court pointed out that the Arkansas statute contemplated 'that the commissioners should represent the collective and corporate interests of the district in litigation between the district and a landowner involving matters personal to the landowner.' The Supreme Court of Michigan has held that 'The drain commissioner in a peculiar sense stands as the representative of those who are interested in the drain and in the collection of the tax.' *Godkin v. Rutterbush*, 147 Mich. 116. This holding makes the Kersh Lake case squarely applicable to the instant case."

We respectfully submit that a proper interpretation of the recent United States Supreme Court decision in the Kersh Lake Drainage District case settles all the issues in controversy here and was authority for the holding of the Circuit Court of Appeals that the decision of the Michigan Supreme Court with reference to this particular project is *res judicata* as to the petitioners herein.

(a) Bondholders' Contention That They Had No Notice of the Proceedings in the State Court Is Not Tenable.

This contention was overruled by the Circuit Court of Appeals in this case and a similar contention was overruled by this Court in the Kersh Lake case. In the Kersh Lake case this Court held that the bondholders were not entitled to be made parties and that they were bound by the Decree of the State Court, even though they received no personal notice of the action in the State Court, because their interests were represented by the Drain Commissioner.

However, the bondholders actually did have notice of the proceedings in the case of *Township of Lake v. Millar* because while they did not appear as parties to the suit, the cause was briefed and argued by Mr. John Spaulding (R. 264-268) who gave the legal opinion on the bonds in the first instance, and his law firm of Miller, Canfield, Paddock & Stone of the adjoining County of Wayne, Michigan, appear on the briefs of the Drain Commissioner of Macomb County as of Counsel.

The case of *Wuchter v. Pizzutti,* 276 U. S. 13, is not applicable to the case at bar. The Wuchter case involves the validity of a statute of New Jersey providing for service of process on non-residents of the State in suits for injury by the negligent operation of automobiles on its highways. The distinguishing feature is that under the statute considered in the Wuchter case the service is made by leaving the Summons with the Secretary of State. The Secretary of State is not made a party to the suit and in no sense stands as the representative of the non-resident motorist at the trial of the cause, so that obviously a means of notifying the non-resident is required; but in the present situation the Drain Commissioner is made a party to the suit and does stand as a representative of the bondholders.

(b) It Is Not the Duty of This Court to Grant Certiorari.

Petitioners ask for certiorari on the allegation that they have been denied due process of law by the decision of the Circuit Court of Appeals. The Circuit Court of Appeals held that the bondholders are bound by the decision of the State Court in an action by taxpayers against the Drain Commissioner, et al., attacking the validity of the drain proceedings and seeking a permanent injunction against the levy and collection of taxes, when the interests of the bondholders and others interested in the drain and the collection of the tax are represented by the Drain Commissioner.

Petitioners are not entitled to certiorari based upon the allegations in their Petition, because—

(a) The question of the binding effect of the State Court decision on the bondholders has already been fully briefed, argued and decided by three competent Judges of the Sixth Circuit Court of Appeals, and it was held by the said Circuit Court of Appeals that under the authority of the Kersh Lake case, *supra,* decided by this Court, that the decision of the Michigan Supreme Court in the case of *Township of Lake v. Millar* is binding upon the petitioners herein. The Circuit Court of Appeals further stated that "there is no essential difference between the statutes of Arkansas (determinative of the Kersh Lake case) and Michigan dealing with this situation." Under the above circumstances there is no duty upon this Court to review the decision of the Circuit Court of Appeals which has already passed upon the contention now urged before this Court. *Magnum Import Co. v. Coty,* 262 U. S. 159, 67 L. Ed. 922.

(b) Moreover, the case of *Hansberry v. Lee,* 311 U. S. 32, is not applicable here because in that case it was the

decision of the State Court which, it was claimed, was in violation of the due process clause of the Federal Constitution, and the question of whether the said State Court decision violated the due process clause of the Federal Constitution had not been passed upon by a Federal Court and under those circumstances this Court very properly granted certiorari.

(c) The question of whether or not the lower court erred in holding that Petitioners are bound by the decision of the Supreme Court of the State of Michigan need not be decided by this Court because the decision of the Circuit Court of Appeals would have been the same regardless of its holding on the *res judicata* question.

The first point decided by the Circuit Court of Appeals was that the recitals in the bonds do not estop the taxpayers, townships or municipalities or the County from raising the defense that the particular projects were constructed wholly without authority, and that the projects and all the proceedings thereunder, including the bonds which were issued as a part of the proceedings, are void. This point was decided on the well known principle of law that there can be no estoppel by recitals against parties who did not join in the recitals, and in this case the recitals were executed only by the Drain Commissioner on behalf of the Drainage District so that no party, with the exception of the Drainage District, could possibly have been bound by the said recitals.

The second point decided by the Circuit Court of Appeals was that not even the Drain Districts were estopped by the recitals in the bonds because it is the law of Michigan that where the Drain Commissioner is completely lacking in jurisdiction the proceedings are illegal and void and bonds issued to defray the expense of such proceedings are void in the hands of innocent holders since there can

be no estoppel when there is a complete lack of jurisdiction. The Circuit Court of Appeals further held that the Federal Courts are bound to follow the law of Michigan under the rule stated in *Erie Railroad Co. v. Tompkins (supra).*

So it is clear that regardless of the decision that the Circuit Court of Appeals came to on the question of whether the bondholders were represented by the Drain Commissioner and were bound by the Michigan decisions on these projects, the decision would still be that the Federal Courts must follow the Michigan decisions holding that where the Drain Commissioner built a sewer he was without jurisdiction, that the proceedings were void, that the taxpayers, townships, municipalities, counties and Drain Districts were not estopped by the recitals in the bonds and that where there is a total lack of power, the bonds issued as a part of the proceedings are void.

We, therefore, respectfully submit that this Court should not grant certiorari to review a question which has already been fully considered and decided against Petitioners by the Circuit Court of Appeals and which, even if it were decided in favor of Petitioners, would not change the decision of the Circuit Court of Appeals in its holding that the bonds are void.

II.

THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, HAS NOT DECIDED IMPORTANT QUESTIONS OF LOCAL LAW PROBABLY IN CONFLICT WITH THE LOCAL STATUTES AND DECISIONS OF THE STATE OF MICHIGAN, AS CONTENDED BY PETITIONERS IN THE SECOND REASON GIVEN FOR ALLOWANCE OF THE WRIT

At the outset of our reply to the second section of petitioners' Brief, we wish to point out that the cases of *New England Mutual Life Insurance Company v. Mitchell,* 118 Fed. (2d) 414, and *American Surety Company v. Baldwin,* 287 U. S. 156, cited on pages 24 and 25 of petitioners' Brief, are not applicable to the facts in this case. The quotation from the New England Mutual Life Insurance Company case applies to a situation where a federal court is called upon to make a decision on a local matter "where there has been no decision on the precise question" by the state court, but the Michigan courts have repeatedly passed upon the questions now before this Court. On the question of the validity of the bonds the Circuit Court of Appeals held:

> "While in the Michigan cases involving these projects the bondholders were not joined as parties, it is the law of Michigan that where the projects are illegal not from mere procedural deficiency, but from total lack of authority to construct the projects, bonds issued to defray the expense of such projects are void in the hands of innocent holders, and this law we follow."

The American Surety Company case, *supra,* cited by petitioners, is not applicable here because the facts are different. In that case the United States Supreme Court withheld action on a petition for a writ of certiorari pend-

ing the action of the Supreme Court of Idaho with reference to actions involving the same parties and the same subject matter. It appears that if the Idaho Supreme Court had granted the relief sought by the American Surety Company there would have been no need for the United States Supreme Court to issue the writ of certiorari, so in that case this Court properly withheld action upon the petition for the issuance of the writ until the American Surety Company had exhausted its remedy in the state court.

Petitioners' contention that this Court should withhold action upon the Petition for a Writ of Certiorari pending the outcome of the case of *City of Highland Park v. Clark,* No. 41,690 Michigan Supreme Court, is answered on pages 59 to 63 of this Brief.

(a) THE CIRCUIT COURT OF APPEALS DID NOT REJECT LOCAL INTERPRETATIONS OF THE DRAIN STATUTE AS TO THE CHARACTER OF THE IMPROVEMENT THAT THE DRAIN COMMISSIONER WAS AUTHORIZED TO CONSTRUCT.

Our reply to paragraph (a) of the second reason given by petitioners divides itself into two points:

1. **That even if it be assumed that the decision of the Michigan Supreme Court decreeing the project to be illegal is not res judicata as to the petitioners, on the record of this case the project was illegal and the proceedings, including the bonds, were void because the project was conceived and constructed not with the primary purpose of furnishing drainage facilities but with the dominant purpose of furnishing sewage facilities.**

The Circuit Court of Appeals properly held that the findings of the Special Master, as confirmed by the District Court, determining the Nine Mile project and the proceedings pertaining thereto to be illegal and void, should not be overruled unless clearly erroneous.

Rule 53, Rules of Civil Procedure, Subdivision (e) (2),
Atherton v. Anderson (C. C. A. 6th), 86 Fed. (2d) 518.

It has been repeatedly held that on a question of fact the United States Supreme Court will accept the concurrent findings of the District Court and the Circuit Court of Appeals supported by substantial evidence.

Kellogg v. Hicks, 285 U. S. 502, 76 L. Ed. 903;
Texas and N. O. R. Co. v. Brotherhood of Railroad and Steamship Clerks, 281 U. S. 548, 74 L. Ed. 1934;
Va. Ry. Co. v. System Federation No. 40, 300 U. S. 515, 81 L. Ed. 789.

The decisions of this Court following *Erie Railroad Company v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, make it unnecessary for Respondents to enlarge upon the established law that the Federal Courts must follow the decisions of the State Court in interpreting the drainage statute and the limits of the jurisdiction of the Drain Commissioner. The Circuit Court of Appeals of the Sixth Circuit in the case of *Royal Oak Drain District, et al. v. Keefe, et al.,* 87 Fed. (2d) 786, in which case counsel for Petitioners herein represented the bondholders, had occasion to interpret the Michigan statutes and determine the jurisdiction of the Drain Commissioner and in so doing properly applied the tests of legality and limits of jurisdiction used by the Michigan Supreme Court in interpreting the Michigan drain statutes and the jurisdiction of the Drain Commissioner. The Circuit Court of Appeals there determined the project to be a legal drain, constructed through legal proceedings, and in doing so found:

1. The ditches were inadequate for the then existing population.

2. There were occasional spots where water stood during wet periods and in the extreme southwest there was a tract of more or less indefinite limits, commonly known as the Hubbard Marsh, which was swampy in character.

3. As the territory grew more urbanized, the ditches were more or less neglected and in 1924-1925 considerable areas between the Hubbard Marsh and the Twelve Mile Road had become marshy and water-logged.

4. "Much of the impetus" to the project was the marshy condition of a large part of the district to be served and the inadequacy of the county ditches which were to be supplanted to take care of the surface water of the area.

5. As in *Kennedy v. Dingman,* 272 Mich. 24, the existing cities of Royal Oak, Ferndale, Berkley, Pleasant Ridge and Huntington Woods, and the Villages of Oak Park and Clawson had sewage facilities and the project was for relief in the way of both sewage and drainage facilities.

6. The depth was sufficient to allow basement drainage from adjacent buildings only.

7. Michigan Supreme Court had not determined the character of the project as a sewer or drain.

Applying these tests to the case at bar we find:

1. That the ditches which were open drains established through assessment of taxpayers, were adequate for surface drainage for the existing population and would be for some time in the future (R. 425, 457, 459, 481, 508, 619, 624, 704, 737, 742, 743, 746, 750).

2. There were no low or marshy or water-logged areas (R. 427, 508, 513, 514, 696, 737, 746).

3. The open drains were not neglected as the territory became urbanized, except for the sewage nuisance.

4. The existing municipalities did not have separate sewage facilities (R. 424, 714).

5. The entire area, urban and suburban, was without sanitary sewage facilities (R. 425, 497, 750) (M. R. 155, 163).*

6. The depth was sufficient to furnish sewage facilities to the entire assessment district (R. 298, 526).

7. The inescapable conclusion is that "much of the impetus" to the project and, in fact, the primary purpose of the design and construction thereof was sewage disposal (R. 261, 424, 425, 438, 447, 448, 450, 451, 483, 495,

*M. R. refers to Master's Report.

497, 701, 727, 731, 732, 734, 736, 737, 739, 740, 743, 744, 761, 799, 800) (M. R. 156, 163).*

8. The Michigan Supreme Court had decreed the Nine Mile-Halfway project to be a sewer (M. R. 151).*

9. The undisputed testimony is that if the sewage was eliminated from the ditches, the existing nuisances and health menaces would likewise be eliminated. In other words, the problem was sewage disposal (R. 290, 424, 425, 427, 438, 447, 448, 450, 451, 483, 497, 701, 704, 727, 731, 732, 734, 736, 737, 739, 740, 742, 743, 799, 800).

The Master recognized some of the foregoing distinctions when he found (R. 169):

> "The evidence is also distinguishable from that in the Royal Oak case, where the Circuit Court of Appeals held the dominant purpose of the project to be drainage in several fundamental respects: (1) The natural drainage in the Royal Oak District was decidedly poorer, there being several marshy areas, chief of which was the large Hubbard swamp, the desire to eliminate which was a primary factor in the initiation of the project. (2) The designing engineers of the Royal Oak Drain testified that they intended the project to function primarily as a drain, and persistently so represented to the Drain Commissioner at the time; while here the designing engineer testified the intention from the beginning was to furnish complete service to the community. (3) The Royal Oak Drain took in sewage from only part of the district, other parts being already served by village or city sewer systems; while here there were no other outlets for sewage except the open drains. (4) There was no treatment plant in connection with the Royal Oak Drain. (5) The structure in the Royal Oak case appears to have

*M. R. refers to Master's Report.

been considerably shallower than here and not to have afforded basement drainage to all parts of the district where it would have been possible so to provide."

In addition to the tests which the Circuit Court of Appeals of the Sixth Circuit applied in coming to its decision in the Royal Oak case, this question must be construed in favor of respondents and appellants below because of the following undisputed facts:

1. The project, as designed, was a closed conduit deep enough underground at the upper end and throughout the assessment district so that laterals could be constructed to furnish sewage facilities, at basement levels, for the entire assessment area, which construction is essential for sewage purposes and is not essential for surface drainage purposes (R. 526, 535-539).

2. The joints in the project were closed to prevent land drainage and to prevent the seepage of sewage, and the Michigan Supreme Court in the cases—*Meyering Land Company v. Spencer,* 273 Mich. 703; *Hankinson v. Deake,* 265 Mich. 1, and *Hoad v. VanWagoner,* 278 Mich. 600, and in other decisions gave material consideration to whether or not the joints were open or closed in determining, as is stated in the Meyering case, whether they were constructed primarily for the purposes of land drainage, or for sewage purposes (R. 432, 511, 526, 527, 539).

3. The project was designed and built so that the laterals would follow streets for sewage purposes. Michigan Supreme Court attached significant importance to this in the Meyering case and other decisions showing the purpose to be to furnish sewage facilities. The undisputed testimony in this case is that connections were made by individuals without the consent of the municipalities and with the consent of the Drain Commissioner as soon as the

project was available for use and that a large number of permits in this case have been issued by the Drain Commissioner's office to individuals for sewage use (R. 405, 406, 407, 415, 417, 510, 511, 619, 802).

4. The plans, specifications and records of the proceedings frequently call this project a "sewer" and in various places plainly indicate that it was to be used for sewage disposal, and anyone examining the same should have known that the primary purpose was sewage disposal (R. 305, 365, 408-415, 436, 437, 502, 549, 550, 590, 591, 605, 613, 614, 618, 625, 626, 751).

5. Design and use of the project was primarily for the disposal of raw sewage without the septic treatment referred to in *Hankinson v. Deake,* 265 Mich. 1 (R. 436).

6. The catch basins and drop manholes as designed and constructed are an essential characteristic of a sewer to eliminate odors and not an essential characteristic of a drain (R. 433, 434, 463, 620, 620) (M. R. 157).*

7. The sewage disposal plant, as designed and constructed, is an essential characteristic of a sewer (R. 543, 545, 547, 548, 561, 568-570, 606, 607, 609, 610, 619, 630, 631).

8. From the plans themselves, it is an obvious conclusion that laterals for use must be constructed if benefits were to be had for assessments made (R. 330, 371, 567, 613, 614, 615, 617).

9. The testimony of the engineer designing the Nine Mile project and the supporting testimony of other engineers on this project is that the project was designed primarily for sewage facilities (R. 440, 486, 487, 495-497, 502, 511, 512, 529, 530, 543, 547, 548, 569, 570, 577, 590, 591, 605, 618, 620, 625, 626, 630, 668, 751, 756, 761).

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*M. R. refers to Master's Report.

10. Considering future needs, the project was large enough to furnish sewage facilities for any contemplated increase in population within the assessment area, but not large enough to furnish drainage facilities were the assessment area to become an urban or suburban area (R. 439, 501).

11. There can be no economic justification for the building of the project in this district where the dominant purpose is drainage, and it was so held by the Michigan Supreme Court in *Township of Lake v. Millar* (R. 263, 608, 614, 619, 775).

12. In the Nine Mile case, not only has the Michigan Supreme Court held the project to be a sewer, but Judge Simons in the Royal Oak case stated that the disposal plant clearly marked the project as a sewer. This statement is not to be lightly regarded.

13. The projects built in the adjoining Detroit area were constructed as sewers by the City of Detroit under the statutes authorizing the construction of sewers and not by the Drain Commission. This adjoining Detroit area, at the time, had the same population and the same needs and the projects were constructed for a similar purpose, that is, first to furnish sewage facilities and, second, incidentally, for drainage purposes (R. 494, 495, 553, 571, 572, 607, 608, 611, 752, 756, 760, 765).

14. The primary purpose of sewage disposal is further shown by the Master Plan for sewage disposal. The primary purpose of sewage disposal was discussed with the consulting engineer of Professor Hoad's engineering firm and the report of this engineering firm introduced in evidence as Exhibit A-4 (R. 341-349) and letter of transmittal dated August 10, 1927 (R. 313, 314), is further proof of this primary purpose (R. 324, 325, 349, 355, 358, 368).

15. The primary use of the project has been to furnish sewage facilities. The presumption is that the use of a given project will be consistent with its primary purpose. The Michigan Supreme Court has frequently referred to other sanitary sewage facilities available, the house connections made in a project, the use or non-use of septic tanks and other matters of use in determining the primary purpose of projects to be sewers or drains. From the plans themselves it is an obvious conclusion that laterals for use must be constructed if benefits were to be had for assessments made. The undisputed testimony is that laterals have been constructed as the existing population was able to pay for sewage facilities. There is an absence of testimony to the effect that laterals were ever constructed to furnish drainage. The undisputed testimony is that the project was used for sewage disposal while still in the process of construction and has been so used since construction (R. 405-407, 415-417, 436, 486, 509-511, 526, 567, 613-615, 617, 619, 802).

16. The inspection of the sewage disposal plant, the outlets into the lake, the interior of the main conduits made through entry through manholes, the type of construction of existing and projected homes for people in low income brackets and a general inspection of the district, as made by the Master accompanied by counsel, leads to the irresistible conclusion that the primary purpose of the project was the furnishing of sewage facilities to the entire district.

17. The testimony is that the Drain Commissioner and the designing engineer had received legal opinion to the effect that they could build a sewer under the Drain Law and in the contracts, a part of the record of the proceedings, a drain was defined to include a sewer as follows:

> "Drain—Any ditch, tile, drain, sewer, or any other interpretation of the word 'drain' as described in Chapter I, Section 2, of Public Act No. 316, of the State, and any acts amendatory thereof" (R. 382, 470, 505, 668).

The Michigan Supreme Court in all its decisions had to interpret the drainage statutes so as not to do violence to Article VIII, Section 15a, of the Michigan Constitution of 1908, which reads:

> "Any drainage district, established under provision of law, may issue bonds for drainage purposes within such district."

2. The Master, the District Court in Overruling Petitioners' Exceptions to the Master's Report, and the Circuit Court of Appeals Were Correct in Applying the Michigan Supreme Court Decisions to the Record in This Case in Their Final Determination That the Michigan Supreme Court Has Been Consistent in Its Interpretation of the Drain Act, and in Its Holding That the Project Is Illegal and the Proceedings Void From Their Inception.

Petitioners when confronted with the decisions of the Michigan Supreme Court, the decision of the Circuit Court of Appeals and respondents' unanswerable contentions, now resort to the one argument that the legality of the bonds must be determined solely from an examination of a portion of the proceedings. They attempt to support this position by an analysis of the *Detroit Trust Company v. Dingman, supra,* claiming, as set forth in the Statement of Facts of their Petition, page 10, that the Circuit Court of Appeals did not properly consider the Detroit Trust Company case, and further, that the Michigan Supreme Court has not been consistent in following out its original inter-

pretation of the Drain Act. There can be no dispute about the fact that the bonds are issued as a part of the proceedings, and petitioners in their statement of the case, page 3 of the Petition for Certiorari, so state. They refuse, however, to recognize the established law of the State of Michigan that the legality of the proceedings and the project constructed must be determined from a combination of circumstances and conditions, of which the proceedings are a part, and that the State Court has consistently held that where the Drain Commissioner exceeded his jurisdiction proceedings are void from their inception. We shall presently show that petitioners are wrong in their interpretation of the Detroit Trust Company case and that the Michigan Supreme Court has been consistent in interpreting the Drain Act and the jurisdiction of the Drain Commissioner.

In referring to *Clinton v. Spencer,* 250 Mich. 135, as the leading Michigan Supreme Court case, the Master held (R. 168):

> "The Supreme Court has been consistent in following out its original interpretation of the Drain Act in subsequent cases, although because of the inevitable difficulty of weighing purposes in a combined structure the distinction between legal and illegal projects has at times become very fine."

As previously stated, the Nine Mile project and proceedings were decreed illegal in the Township of Lake case. The court there held that the extent of the authority of the drain commissioner was measured by the statute from which he derived his authority and not from his own acts and assumptions of authority. This case has frequently been cited as authority by the Michigan Supreme Court and the Detroit Trust Company case has not changed the State Court's reference to it as precedent. In the Detroit

Trust Company case the State Court stated that its decision came within the same Court's decision in *Hankinson v. Deake,* 265 Mich. 1, and *Kennedy v. Dingman,* 272 Mich. 24, and we cite these and other Michigan cases as a complete answer to petitioners' contention that the holdings of the Michigan Supreme Court no longer support respondents' contention. In *Hankinson v. Deake,* 265 Mich. 1, the State Court held, page 7:

> *"If the structure is a sewer, the drain commissioner was absolutely devoid of jurisdiction in the premises and the entire proceedings were a nullity and subject to attack by the methods employed herein. Township of Lake v. Millar,* 257 Mich. 135." (Italics ours.)

In *Kennedy v. Dingman,* 272 Mich. 24, the Court said, on Page 27:

> "The LeBlanc drain is less like a sewer than the project involved in *Township of Lake v. Millar,* because it has no pumping station or filtration plant connected with it, but it is also more like a sewer than the project involved in *Hankinson v. Deake,* because it is monolithic construction without porous joints."

On Page 30, the Court stated:

> "In the case of the *Township of Lake v. Millar, supra,* as stated in the opinion, a sewer was built about 7½ miles long, in places 35 feet below the surface, with a circular concrete barrel ranging from 6 to 11 feet in diameter, and with a purifying plant for sewage treatment in connection therewith. *The record shows that the main and primary purpose was the construction of a drain and not a sewer, although in a few instances the latter use might become incidental."* (Italics ours.)

In *Meyering Land Co. v. Spencer,* 273 Mich. 703, on page 708, the Court said:

> "If a sewer was constructed in pursuance of a petition for a drain, the drain commissioner was without jurisdiction to establish it. *Clinton v. Spencer, supra; Township of Lake v. Millar, supra.*"

Judge Simons of the Sixth Circuit Court of Appeals had these decisions before him when he held in the case of *Royal Oak Drain District v. Keefe,* 87 Fed. (2d) 786, that the Nine Mile project was a sewer and not a drain, as follows:

> "Doubt as to the legality of the proceedings was first entertained after the Michigan Supreme Court on March 7, 1930, in *Clinton v. Spencer,* 250 Mich. 135, invalidated assessments and enjoined the collection of taxes for the construction of the Southfield Drain. This was a large underground sewer entirely independent of any other drainage project, and its construction was held not authorized by the drain law. There followed *Kinner v. Spencer,* 257 Mich. 143, a decision to the same effect in respect to assessments for the identical project. Meanwhile, in *Township of Lake v. Millar,* 257 Mich. 135, the court enjoined assessment and collection of taxes for a project in Macomb County for the maintenance of a drain disposal plant, filtration beds and purification plant, which clearly marked the enterprise there as a sewer."

We submit that the Michigan Supreme Court was consistent in following out its interpretation of the Drain Act in the Detroit Trust Company case, and that this case is to be distinguished on the following grounds:

1. The drain commissioner testified and the record discloses that the primary purpose was drainage and that the furnishing of sewage facilities was incidental, whereas in the Nine Mile case the record, including the testimony

of the designing engineer and other engineers, discloses that the primary purpose was to furnish sewage facilities and that drainage was incidental. A complete answer to petitioners' contention that the legality of the proceedings, of which the bonds are a part, must, under Michigan law, be determined from an examination of the proceedings only, is found in the Detroit Trust Company case where the Michigan Supreme Court gave sufficient consideration to the testimony of the Drain Commissioner, who was an engineer, as to the purpose of the project to quote such testimony in its opinion on Page 176, as follows:

> "Q. Were you building this structure there to take their sewage, or to take their surface water; which?
>
> A. It was to take the surface water, the storm water, and the subsurface water, *and incidentally, the sanitary.* (Italics ours.)
>
> • • • • •
>
> Q. Would you say, in your opinion as an engineer, that the size of the filtration basin and septic tank would indicate that the disposal of sewage was incidental to the structure as a whole?
>
> A. Yes."

A study of the Detroit Trust Company case leads to the conclusion that the Michigan Supreme Court determined that there was an urgent need for drainage, and everyone connected with the construction of the project know from the outset that the sewage factor would be incidental to the drainage and the Drain Commissioner so testified.

2. The Michigan Supreme Court held in the Nine Mile case that the project was a sewer and that the dominant purpose was to furnish sewage facilities, and the same court held in the Detroit Trust Company case that the dominant purpose was drainage and that the furnishing of sewage facilities was incidental.

3. The record in the Detroit Trust Company case discloses that the project was part of a general plan for drainage and that the existing drainage was not adequate, whereas in the Nine Mile case the record discloses that the drainage was adequate and the project was part of a master plan for sewage disposal.

4. It is important to note that the Michigan Court in the Detroit Trust Company case considered how the project was used after construction in determining its purpose, the Court stating on page 177:

> "That this structure is in fact *effectively used* as a means of underground drainage for this district is indicated by the following testimony given by one of plaintiffs' witnesses who all his life had lived on Grosse Ile and at the time was highway commissioner." (Italics ours.)

5. The record in the Detroit Trust Company case discloses that a portion of the area had sanitary sewage facilities before the project was planned, whereas in the Nine Mile case the entire assessment area was without sanitary sewage facilities.

6. The *Michigan Supreme Court Records and Briefs* in the Detroit Trust Company case, Volume 3170, substantiate our position as to the distinguishing features in that case. We quote from Page 49 of the brief of counsel for defendants and appellants:

> "The case of *Township of Lake v. Millar*, 257 Mich. 135, and decided March 2, 1932, was also an action to enjoin the assessment and collection of taxes for a project known as 'Nine Mile Half Way Drain' situated in Macomb County. From a perusal of the case and the type of the structure, and the prominence of a sewage disposal plant the court said, in substance, in its determination: in enjoin-

ing the assessment and collection of taxes, that the sewage disposal plant, filtration beds and purification plants clearly mark the enterprise in the *Township of Lake v. Millar* as a sewer, and the similarity of the structure as compared to the project involved in the case of *Clinton v. Spencer, supra,* whereas, in the instant case there are no filtration beds, nor is there a sewage disposal plant. There is, however, a small diversion chamber and septic tank negligible in size which the record discloses was built for the purpose of providing for the incidental need of such sewage as would be carried off by this drain.

"In the Lake Township case the court said that the drain in question was similar to the drain involved in the *Clinton v. Spencer* case. It certainly cannot be said that the structure in the *Clinton v. Spencer* case and the Lake Township case and the attendant circumstances pertaining thereto are in any way comparable with Grosse Ile Tile Drain No. 4 as to their physical construction."

Again, in distinguishing the *Meyering Land Company* case, 273 Mich. 703, the brief states on Page 58:

In the case at bar, however, the record shows that there was a need for drainage, and that a plan had been formulated for the draining of the whole of the Island of Grosse Ile, and that drains one, two, three, eight and nine were constructed for the purpose of drainage, and that as a part of the originally formulated plan, Grosse Ile Tile Drain No. 4 was added to and became a part of the Drain Commissioner's plan for providing drainage for the Island of Grosse Ile (Ex. No. 3). The necessity for the drainage is clearly indicated in the forepart of this brief where it shows that the roads were in a bad condition; that there were low spots on the island, and that it was impossible for the citizens of the community to send their children to school. The record further shows not only these circum-

> stances as indicating the necessity for drainage on the Island of Grosse Ile, but also the very minutes of the Township meetings relating to this particular area, evidenced the necessity and their desire for proper drainage in this particular community, and that the conditions were so acute that funds were appropriated for the purpose of defraying the cost of a survey of this particular area relative to drainage."

In the Detroit Trust Company case the court states the controlling question is whether the construction involved in this case was in good faith laid out and built as a drain or whether it in fact was conceived and constructed as a sanitary sewer. Applying this test to the Nine Mile case leads to the one conclusion that the project was not in good faith laid out and built as a drain but was conceived and constructed with the dominant purpose of furnishing sewage facilities. The Supreme Court, in the Detroit Trust Company case, gives some consideration to Section 5, Chapter XVII of Act 365 of the Public Acts of Michigan for 1925, quoted at Page 14 of the appendix to Petitioners' Brief, permitting the use of county drains for sewage disposal plants, and it is to be noted that the same court gave full consideration to this provision of the law on the Nine Mile project in the *Township of Lake v. Millar* case, as is set forth in full on Page 26 and referred to on Page 31 of the brief of the drain commissioner and special counsel for the bondholders, Miller, Canfield, Paddock & Stone, appearing in *Volume 2360* of the *Michigan Supreme Court Records and Briefs.*

An examination of Section 5, Chapter XVII, of Act 365 of the Public Acts of Michigan for 1925, in conjunction with the history of and the record of the Nine Mile project, discloses that the sewage disposal plant was illegal, as part of a project in which the primary purpose was not drainage, because:

1. The project is a closed conduit constructed of monolithic concrete deep underground and is not one which could be enlarged or widened and even the cleaning would be questionable as contemplated by Section 5.

2. The project was not one then available, but was new construction.

3. The Attorney General had rendered an opinion that it was unlawful for individuals to use a county drain for sewage disposal as this project was designed for and used (R. 804, 805).

4. The Act provides that a percentage of the costs of construction shall be apportioned to municipalities, such as the City of East Detroit and City of Centerline, and no such apportionment was ever made in the proceedings and plans and specifications, or at any subsequent time (R. 694) (M. R. 159).*

We respectfully submit that the Circuit Court of Appeals properly determined the entire proceedings void because the Drain Commissioner was absolutely devoid of jurisdiction in the premises and in doing so properly applied the Michigan Supreme Court decisions and did not, as contended by petitioners, decide an important question of local law in conflict with local statutes and decisions of the State.

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*M. R. refers to Master's Report.

(b) THE CIRCUIT COURT OF APPEALS WAS CORRECT IN ITS DECISION ON THE EFFECT OF THE RECITALS IN THE BONDS.

Petitioners in briefing the question as to the effect of the bond recitals have completely disregarded three important principles of law which are controlling as to the issue of estoppel in this case:

1. Estoppel does not apply to the appellants who did not sign the bonds or make any representations pertaining thereto.

It is the contention of respondents, other than the Drain Commissioner, that they are not estopped to deny the validity of the bonds because they did not sign the bonds, because they are not parties to the bonds and because they made no representations in respect to the bonds.

The whole theory of estoppel by recitals is that the obligor in the bond made certain statements or representations on the face of the bond which said obligor would be subsequently estopped to deny the trust of as against an innocent holder of said bond for value. The obligor in the bonds sued on is expressly stated to be the drain district only. The County of Macomb or the appellant townships, city or village not being obligors in said bonds nor parties thereto, obviously made no recitals or representations, and hence cannot be estopped.

It is elementary that the doctrine of estoppel arising out of recitals in bonds cannot apply against appellants who are not parties to the bonds.

The United States Supreme Court in the case of *Deery's Lessee v. Cray*, 18 L. Ed. 653, stated:

> "* * * No person can rely upon estoppel growing out of a transaction to which he was not a party nor a privy, and which in no manner touches his rights. There is no mutuality, which is a requisite of all estoppels."

The Michigan Supreme Court has from an early date, as appears from decisions hereinafter cited, held that the Drain Commissioner is not the agent of the municipalities and the county, and there is no authority which can make him the agent of any of the appellants to make representations or to enter into any mutual agreement. In *Township of Cooper v. Little,* 220 Mich. 62, the court said, on Page 64:

> "In a long line of cases beginning with *Dawson v. Township of Aurelius,* 49 Mich. 479, this court has uniformly recognized that the fiscal affairs of a drain were separate and distinct from the general fiscal affairs of the municipality and *that the municipality was not bound or obligated by the acts of the drain commissioner.* Among the cases see *Camp v. Township of Algansee,* 50 Mich. 4; *Wallace v. Sortor,* 52 Mich. 159; *Taylor v. Township of Avon,* 73 Mich. 604; *Hillyer v. Township of Jonesfield,* 114 Mich. 644; *Jenney v. Township of Mussey,* 121 Mich. 229." (Italics ours.)

On Page 65, the Court stated:

> "These authorities conclusively establish the law to be that the municipality is not in any way interested in the fiscal affairs of the drain. The township is in no way chargeable with the acts of its officers in the administration of the drain law, *nor can the county be so chargeable."* (Italics ours.)

See also *Brooks v. County of Oakland,* 268 Mich. 637, in which case the court made the following statement on Page 639:

"Moreover, the county is not liable for the refund of void drain taxes. The drain commissioner, in establishing the project, and the county treasurer, in taking and handling the assessments, *are not agents of the county* nor are the funds received for the use of the county. The officers perform special statutory duties for drainage districts. The reasons and principles governing township liability under similar statutes and set out in the following cases are applicable: *Taylor v. Township of Avon,* 73 Mich. 604; *Hillyer v. Township of Jonesfield,* 144 Mich. 644; *Brown v. Warner,* 159 Mich. 274. And *Township of Cooper v. Little,* 220 Mich. 62, in which the court, after a review of the authorities, said:

> 'These authorities conclusively establish the law to be that the municipality is not in any way interested in the fiscal affairs of the drain. The township is in no way chargeable with the acts of its officers in the administration of the drain law, nor can the county be so chargeable.'

"Liability of the county is not established by 1 Comp. Laws 1929, section 4937, which provides for payment of principal and interest on bonds out of *general county funds* when the drain fund is insufficient." (Italics ours.)

We submit that under the authorities cited that even if the Drain Commissioner should be held to be estopped to deny the validity of the bonds, the other appellants are not so estopped. The bonds were signed by the Drain Commissioner only and the full faith and credit of the drainage district only is pledged. Appellants other than the Drain Commissioner made no representations in respect to the bonds. The Drain Commissioner is not the agent of appellants other than himself, and they are not bound by his representations or acts. There is no mutuality of contract between the holders of bonds and appel-

lants, who did not sign the bonds or make any representations pertaining thereto. The elementary law under the authorities cited is that to create an estoppel there must be a representation by word or act of the party estopped, which has misled the party asserting the estoppel to his damage, and that the element of mutuality must be present.

The legal and logical conclusion, therefore, is that the appellants other than the Drain Commissioner are not estopped to deny the validity of the bonds.

On this point the Circuit Court of Appeals properly held:

> "The theory of estoppel by recital is that the holder of the instrument is entitled to rely upon the facts recited in the bond. Each of the bonds in question certified that all acts had been done in order to make the bonds a binding obligation of the drain district. No bond makes any recital with reference to its being an obligation of the township or municipality in which the project is situated. Only one set of bonds, that of the Bloomfield Storm Sewer Drain District, recites the statutory obligation of the county to advance funds on the projects. None of the bonds is executed by any township, municipal or county officer, with the exception of the county drain commissioner and the county clerk. Under Michigan law the drain commissioner does not represent any political entity except the drain district, and his representations are in no way binding upon the townships, the municipalities or the counties, for none of these political subdivisions is chargeable either with the acts of the drain commissioner or with the acts of its officers in the administration of the drain law. *Township of Cooper v. Little,* 220 Mich. 62, 64. Moreover, the county is not liable for the refund of void drain taxes, since the drain commissioner does not act for the county in the establishment of the project. *Brooks v. County of Oakland,* 268 Mich. 637, 639.

> The county clerk is merely the clerical officer of the county. He has no authority to pledge the faith and credit of the county nor to certify on behalf of the county to facts stated in the bonds. His signature is placed upon the instrument as a certification of the authenticity of the signature of the county drain commissioner.
>
> "We conclude that appellants other than the drain districts are not estopped to defend upon the ground of illegality of the various projects, and that as the proceedings are plainly null and void under Michigan law, the District Court erred (1) in ordering the appellants, municipal township and county officials in all cases, to proceed to assess drain taxes in these projects; (2) in issuing injunctions against such officers, and (3) in ordering the counties to make advancements into the drain district funds."

2. Bondholders are not entitled to rely upon recitals in the bonds where the Drain Commissioner was completely lacking in jurisdiction to issue the bonds or to create any legal liability whatsoever in the undertaking.

In section 2 (b) of petitioners' brief, a considerable amount of space has been devoted to the question of estoppel by recitals. However, it clearly appears that the Drain Commissioner was without jurisdiction and that the proceedings were illegal and void in their inception. In the case of *Township of Lake v. Millar, supra,* where this identical project was found and decreed to be illegal, the Michigan Supreme Court stated:

> "Defendants contend, and the trial court held, that, plaintiffs not having attacked the regularity of the proceedings here involved by certiorari, are estopped from questioning their regularity in this proceeding.
>
> • • • • •

"The question is presented whether a petition for a drain confers jurisdiction upon the drain commissioner to build a sewer; whether a petition to the drain commissioner to do something within the scope of his authority confers jurisdiction upon him to do something wholly without the scope of his authority; whether a petition to do something he has a right to do confers jurisdiction upon him to something which he has no right to do; whether upon filing a petition for a drain which he has a right to build, the commissioner may lay out and construct a sewer which he has no right to build? A drain commissioner may not, by mere assumption of authority, legally do that which he has no authority to do. If, upon a petition to do what he has a right to do, he may do what he has no right to do, the extent of his authority is measured by his own acts and conduct and not by law. The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority. The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari, but AN ENTIRE WANT OF JURISDICTION MAY BE TAKEN ADVANTAGE OF AT ANY TIME. The drain commissioner had no jurisdiction to construct a sewer any more than to construct a Covert road. No one will contend that if the drain commissioner, when the petition for a drain was filed with him, had laid out an assessment district, established and constructed a Covert road, the plaintiffs would have been without remedy. The same legal question is here presented. THE PROCEEDINGS ARE VOID FOR WANT OF JURISDICTION." (Emphasis supplied.)

See also the cases of *Hankinson v. Deake,* 265 Mich. 1; *Kennedy v. Dingman,* 272 Mich. 24; and *Meyering Land Co. v. Spencer,* 273 Mich. 703, where the Michigan Supreme

Court decision on this project has been cited as a precedent for the established law that where the project is illegal, as in the case at bar, the Drain Commissioner was, as stated by the Michigan Supreme Court in *Hankinson v. Deake,* absolutely devoid of jurisdiction in the premises and the entire proceedings were a nullity. It is also important to note that in the case of *Clinton v. Spencer,* 250 Mich. 135, the Michigan Supreme Court held the proceedings to be void from their inception. These Michigan cases clearly stating the law to be that where the Drain Commissioner is without jurisdiction the proceedings are void from their inception, are, of course, binding upon the Federal Courts under the doctrine of *Erie Rd. v. Tompkins, supra.*

Having established the fact that the proceedings were void in their inception, it follows that the bonds which were issued as a part of the proceedings are also void. The Michigan courts have repeatedly held that the doctrine of estoppel is not applicable where the projects are illegal because of a total lack of jurisdiction in the Drain Commissioner. It was so held by the Michigan Supreme Court in the case of *Township of Lake v. Millar, supra,* with reference to the question of estoppel against the taxpayers for failure to take certiorari proceedings and in the *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, the Michigan Supreme Court stated:

> "These authorities conclusively settle the law in this State that, property owners assessed for benefits, even though they participate in the improvement and fail to avail themselves of the statutory remedy for review, are not estopped to thereafter attack such proceeding, where the objections raised go to the jurisdiction and involve constitutional rights.
>
> "The general rules of estoppel, as applied to void acts, are thus summarized:

'In accord with the general rules already discussed, the rule is laid down broadly in many decisions that a municipal corporation is not estopped to deny the want of power to make a contract by receiving the benefits thereof; and it has even been held that a full performance by the contractor of a contract with a city which is void because opposed to the Constitution and laws and contrary to public policy will not prevent the city from pleading its want of power and the illegality of the contract. If the thing done is illegal or unwarranted by law, however beneficial it may be, the public is not estopped to deny its validity.' *21 C. J.* p. 1214.

'The doctrine of estoppel cannot be applied against the city to validate a contract which it has no power to make, or which has ceded away, controlled, or embarrassed its legislative or governmental powers. Generally a municipal corporation is not estopped from denying the validity of a contract made by its officers, when there has been a total absence of authority for making such contract. And if the contract is absolutely *ultra vires,* the municipality is not estopped to deny its validity, though the benefits thereof have been received by the municipality.' *10 R. C. L.* pp. 708, 709.''

The Circuit Court of Appeals, Sixth Circuit, recognized the applicable rule of law in the case of *Royal Oak Drain District v. Keefe,* 87 Fed. (2d) 786, when it held:

''The argument is pressed that the structure for the payment of which the bonds were issued was a sewer and not a drain, and so not under the jurisdiction of the drain commissioner under Michigan law. His acts are said to have been mere usurpations, and it is urged he was without power to issue bonds or create any legal authority in the undertaking. If the premise is sound, the argu-

ment is persuasive and based upon unimpeachable authority. *Anthony v. County of Jasper,* 101 U. S. 693, 697; *German Savings Bank v. County of Franklin,* 128 U. S. 526; and many other cases."

The Circuit Court of Appeals in its opinion in this case well stated the applicable rules and cases on the point when it held:

> "The decrees in the Meyering Land Co. and Detroit Fire and Marine Ins. Co. cases, *supra,* construing as they do the Michigan county drain law, are binding upon this court. Rulings of state courts construing state statutes were binding upon federal courts prior to the announcement of *Erie Rd. Co. v. Tompkins,* 304 U. S. 64. Certainly since that decision the federal courts are governed by state law to a greater extent than formerly; but the effect of the holding of the District Court in this case is to set at nought the judgment of the state courts that these projects are absolutely void. The bonds do not recite that the various projects have been determined to be drains rather than sewers, and hence the appellants, in seeking to show that they are in fact sewers and illegal, are not seeking to establish any facts inconsistent with the recitals. While in the Michigan cases involving these projects the bondholders were not joined as parties, it is the law of Michigan that where the projects are illegal not from mere procedural deficiency, but from total lack of authority to construct the projects, bonds issued to defray the expense of such projects are void in the hands of innocent holders, and this law we follow. *Erie Rd. Co. v. Tompkins, supra; Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202. The rule that where the issuing officials are completely lacking in power to issue bonds for the particular purpose, *bona fide* purchasers are not entitled to rely upon recitals in the bonds to the effect that the legal and statutory

prerequisites have been complied with, was recognized in *Royal Oak Drain Dist. v. Keefe, supra.* There this court said that if the drain commissioner had no jurisdiction under Michigan law, he was without power to issue bonds or to create any legal liability whatsoever in the undertaking. In this we followed the Michigan decisions. As declared in *Spitzer v. Village of Blanchard,* 82 Mich. 234, 244:

> 'It is not entirely accurate to say that holders of bonds issued by a municipal corporation will be protected as *bona fide* purchasers if the corporation could, under any circumstances, issue the same. This question was considered by the Supreme Court of the United States in *Dixon Co. v. Field,* 111 U. S. 89 (4 Sup. Ct. Rep. 315), where the proper distinction is drawn as to irregularities in the exercise of the power conferred and the total want of power to do the act. Where there is a total want of power, under the law, in the officers or board who issue the bonds, then the bonds will be void in the hands of innocent holders, the distinction being between questions of fact and questions of law. If it is a question of fact, and the board or officers are authorized by law to determine the fact, then their determination is final and conclusive. And although it may be contrary to the fact, yet, if recited in the bond that the necessary and proper steps required by law to be taken had been taken, then the municipality is estopped from denying that they were taken. But it is held that all persons are presumed to know the law, and if the law created conditions precedent upon which the right to act at all depended, and these conditions were not complied with, and the law appointed no board or officer to determine that fact, then there could not be an innocent holder of such bonds. *Bernards Township v. Morrison,* 10 Sup. Ct. Rep. 333.'

"This holding has never been reversed. Hence the test in Michigan as to estoppel raised by recitals in the bonds is whether the officials making the recitals are wholly without power in the premises. If so, no estoppel arises.

"Appellants rely upon certain Michigan decisions which they claim are *contra,* but they are distinguishable in principle. In *Thompson v. Village of Mecosta,* 127 Mich. 522, and *Schmid v. Village of Frankfort,* 131 Mich. 197, the villages themselves took part in a false recital, contrary to facts later sought to be asserted. In *Gibbs v. School Dist.,* 88 Mich. 334, there was not a total lack of power in the officials making the recitals, as here, but failure to comply with statutory provisions.

"We are unable, under the Michigan decisions with reference to these drains, to avoid the conclusion that the drain commissioners had no jurisdiction. The holding of the Michigan courts upon this subject is a conclusion of law and binding here. Since the drain commissioners were without jurisdiction, they were totally without power to make recitals binding upon the drain district, and this circumstance is fatal to any claim of estoppel. *First Wisconsin National Bank v. Bessemer Twp.,* 286 Mich. 426; *Spitzer v. Blanchard, supra; Chemical Bank & Trust Co. v. County of Oakland,* 264 Mich. 673. The recital 'that all acts, conditions and things required to be done have been performed as required by law, was a legal conclusion upon which no purchaser was entitled to rely. *First Wisconsin National Bank v. Bessemer Twp., supra.* An examination of the records which the statute required the drain commissioner to maintain (Section 10, c. 2, Act 316, Michigan Public Acts, 1923) would have revealed all the facts necessary for a determination that the project was illegal. A public official who is not empowered to issue bonds cannot create such power by recitals which he may incorporate in the bonds he issues. *Portsmouth Savings Bank v. Ashley,* 91 Mich. 670."

Petitioners have cited numerous cases which are inapplicable because in said cases there was no finding that there was a complete lack of jurisdiction in the parties who issued the bonds. Petitioners have repeatedly refused to recognize the fact that since the Michigan Supreme Court has held that the Drain Commissioner in this case was without jurisdiction, which decision was concurred in by the Circuit Court of Appeals, and since this Court must follow the Michigan decision the rule stated by the Circuit Court of Appeals, as follows, is clearly applicable, and any other arguments and citations of cases with reference to the effect of recitals in the bonds becomes academic. The Circuit Court of Appeals correctly stated the applicable rule of law in its opinion in this case (R. 986) when it held:

> "Since the Drain Commissioners were without jurisdiction they were totally without power to make recitals binding upon the drain district and this circumstance is fatal to any claim of estoppel."

3. The collection of taxes to pay for the illegal projects would violate the due process clauses of Federal and State Constitutions.

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be * * * deprived of life, liberty or property without due process of law. * * *"

Article II, Section 16 of the Michigan Constitution of 1908 provides as follow:

> "No person shall be * * * deprived of life, liberty or property without due process of law."

The Michigan Supreme Court has, on a number of occasions, held that the levy and collection of a tax to pay

for a void project would constitute the taking of property without due process of law.

> "Here we are not dealing with an irregular exercise of power on the part of the drain commissioner, or, with procedural defects in the proceedings under which the sewers were constructed. The statute did not authorize the construction of either project, or the assessment of the tax. The acts of the drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law. Under such circumstances, no estoppel would arise to bar an action to restrain the collection of the void tax."
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> *Village of Oak Park v. Van Wagoner,* 271 Mich. 450.
>
> "If, as we hold, defendants were wholly without authority to lay this drain, the ultimate result of assessment of benefits and the collection from plaintiffs of the drain tax would be to deprive them of their property without due process of any sort. * * * Where the officials acting in the drain proceedings are wholly without jurisdiction or authority to act, the proceeding is void, and equity has power to restrain."
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> *Fuller v. Cockerill,* 257 Mich. 35.

Article VIII, Section 15-a of the Michigan Constitution of 1908 provides:

> "Drainage District Bonds. Section 15-a. Any drainage district established under provision of law, may issue bonds for drainage purposes within such district."

We respectfully submit that in view of the fact that the Drain Commissioner did not issue bonds for *drainage purposes* in accordance with the Michigan constitutional

provision and that in view of the Michigan decisions quoted above, the Circuit Court of Appeals decided this case in the only way it could have decided it in conformity with the State and Federal Constitutions and the law of the State of Michigan.

(c) THE CIRCUIT COURT OF APPEALS WAS CORRECT IN ITS HOLDING THAT WHERE THE PROCEEDINGS ARE PLAINLY NULL AND VOID UNDER MICHIGAN LAW AND THAT WHEN THE BONDS WHICH ARE A PART OF THE PROCEEDINGS ARE VOID, THE TAX OFFICIALS ARE NOT UNDER A DUTY TO PROCEED TO ASSESS DRAIN TAXES OR TO MAINTAIN DRAIN FUNDS.

Petitioners have sought by the use of one paragraph in the Circuit Court of Appeals' opinion to make it appear that the Circuit Court of Appeals held that regardless of whether the bonds are valid or invalid the tax officials had no power to proceed to assess drain taxes. The Circuit Court of Appeals made no finding on this point one way or the other. The statement referred to by the petitioners (R. 982) was made in the opinion of the Circuit Court of Appeals in which it also held that the bonds were void, and the petitioners' construction of the language used is incorrect and is not what the Circuit Court of Appeals held. However, even if the Circuit Court of Appeals had held what petitioners say it did, there is ample authority for such a holding in the Michigan decisions. In the case of *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, 459, the Michigan Supreme Court held:

> "Here we are not dealing with an irregular exercise of power on the part of the drain commissioner or, with procedural defects in the proceedings under which the sewers were constructed. The

statute did not authorize the construction of either project, or the assessment of the tax. The acts of the drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law. Under such circumstances no estoppel would arise to bar an action to restrain the collection of a void tax."

(d) PETITIONERS' CONTENTION THAT THE COURT OF APPEALS IGNORED THE EFFECT OF THE STATUTE PROHIBITING COLLATERAL ATTACK ON THE DRAIN PROCEEDINGS IS WITHOUT MERIT.

Petitioners admit the rule of law followed by the state court in *Township of Lake v. Millar, supra,* where the court held in passing upon these identical proceedings:

> "The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari but an entire want of jurisdiction may be taken advantage of at any time. * * * The proceedings are void for want of jurisdiction."

The argument now advanced by petitioners has been repeatedly asserted in the state court until it appears that the state court in *Meyering Land Co. v. Spencer,* 273 Mich. 703, now before this court for consideration in a companion case, became somewhat impatient with passing on the so-called usual claim, when it stated on page 709:

> "The usual claim is made that the proceedings must have been attacked by certiorari. This question has been passed upon by this court in *Clinton v. Spencer, supra; Fuller v. Cockerill,* 257 Mich. 35; and *Township of Lake v. Millar, supra.* I can add nothing to what was said in these cases upon the question of the necessity of resorting to certiorari. It is not necessary where there is no jurisdiction."

The Special Master gave full consideration to this provision of the law in his Report (R. 196) where he stated:

> "The Supreme Court of Michigan has held this statute does not apply where the Drain Commissioner has undertaken a project beyond his jurisdiction. *Township of Lake v. Millar, supra,* and other cases."

Petitioners did not file any exception to the last mentioned finding of the Special Master and cannot now raise the question.

The Master correctly found that the doctrine stated in *Douglas v. Pike County,* 101 U. S. 677, was a logical development of the doctrine announced in *Swift v. Tyson,* and that since that case has been overruled "it would seem that the superstructure of law erected on that case should fall with it" (R. 173).

Petitioners' argument is just another instance where they refuse to recognize the doctrine of *Erie Rd. Co. v. Tompkins,* 304 U. S. 694, and subsequent cases, as to the binding effect upon federal courts of state decisions, that except in matters governed by the federal constitution or acts of congress the law to be applied in any case is the law of the state.

Moreover, it must be admitted that it is the rule in Michigan that where the officials acting in the drain proceedings are wholly without authority to act, the proceedings are void and the collection of drain taxes from the appellants would be unconstitutional because it would deprive them of their property without due process of law. The Michigan Supreme Court so held in the case of *Fuller v. Cockerill,* 257 Mich. 35, in which it said:

> "If, as we hold, defendants were wholly without authority to lay this drain, the ultimate result of

> assessment of benefits and the collection from plaintiffs of the drain tax would be to deprive them of their property without due process of any sort. * * * Where the officials acting in the drain proceedings are wholly without jurisdiction or authority to act, the proceeding is void, and equity has power to restrain."

The argument of respondents that the assessment and collection of drain taxes for a project void for lack of jurisdiction in the drain commissioner would violate the constitutional rights of the respondents, has been more fully developed herein on pages 51 to 53.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS NOT IN CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, OR OF THIS COURT

Petitioners state as their third reason for the allowance of the writ that the Circuit Court of Appeals has decided important questions as to the powers of federal courts to restrain actions to enforce judgments of concurrent courts in a way probably in conflict with the decision of the Circuit Court of Appeals (Eighth Circuit) in *Fetzer v. Johnson,* 15 Federal (2d) 145, and in conflict with the decision of this court in *Chase National Bank v. City of Norwalk,* 291 U. S. 431. Petitioners say that the Circuit Court of Appeals in this case *apparently* decided an important question in conflict with the Fetzer case and the Chase National Bank case because it failed to restrain by its injunction parties before it in this case from using the state court decrees in a manner inimical to parties who seek relief before them. Petitioners' contention on this point is based upon a false premise. In this case the Circuit Court of Appeals did not decide that if the bonds

were for any reason held to be valid that the injunction of the state courts forbidding the collection of taxes could not be overridden. The Circuit Court of Appeals made no finding upon this question one way or the other. There was no necessity for the Circuit Court of Appeals to pass on this question because the Circuit Court of Appeals had found that the proceedings were void, that the doctrine of estoppel by recitals was not applicable, that the bonds were void and that the Bills of Complaint should be dismissed, so it is difficult to understand petitioners' contention when there could be no possible occasion for such a decision by the Circuit Court of Appeals and when in fact no such decision was made by the Circuit Court of Appeals. Even petitioners evidenced doubt of the correctness of their contention when they stated that "an important question which the Court of Appeals has *apparently* decided in conflict with this court * * *."

Since the Circuit Court of Appeals made no such decision we respectfully submit that this contention of petitioners is not a proper reason for granting certiorari. See the case of *Layne and Bowler Corp. v. Western Well Works,* 261 U. S. 387, 67 L. Ed. 712, in which this Court held that a writ of certiorari granted by this court to settle a conflict between decisions of two Circuit Courts of Appeal will be dismissed as improvidently granted if examination disclosed that there was in fact no conflict between the decisions. Since there is no decision by the Circuit Court of Appeals in this case upon the point raised by petitioners there is no basis for the allowance of the writ.

Even if the Circuit Court of Appeals had held what the petitioners have erroneously assumed that it held, the fact that such a holding conflicted with the holding of the Circuit Court of Appeals (Eighth Circuit) in *Fetzer v.*

Johnson, supra, or of this court in the Chase National Bank case would have no controlling effect here because the decision of the Circuit Court of Appeals in this case would have been based on the law of Michigan and the United States Supreme Court will not grant certiorari in a case where the decision of the Circuit Court of Appeals is controlled by state law solely because the decision is in conflict with the decision of other circuits. The decision of this court in *Ruhlin v. New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290, is controlling as to petitioners' contention on this point:

> "As to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari by the Supreme Court of the United States as the conflict may be merely corollary to a permissible difference of opinion in the state courts."

Petitioners have also failed to take into consideration the effect on the Fetzer case of the holding of this Court in the cases of *Erie Railroad v. Tompkins, supra,* and *Ruhlin v. New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290. If the Eighth Circuit Court of Appeals were to pass on facts in that case at this time there would undoubtedly be a decision to the effect that the decision of the Supreme Court of Oklahoma must be followed.

IV.

PETITIONERS ARE NOT ENTITLED TO HAVE THIS COURT WITHHOLD ITS DECISION IN THIS CASE PENDING THE DECISION OF THE MICHIGAN SUPREME COURT IN THE CASE OF HIGHLAND PARK v. CLARK

The case of the *City of Highland Park v. Clark,* No. 41690 Michigan Supreme Court, is a mandamus action to compel the levy and spread of taxes to pay bonds issued for the construction of a project in a drainage district which is entirely foreign to the bonds, project and drainage district in this case. On the other hand, this is a class suit on behalf of bondholders to determine the validity and force the payment of bonds issued to pay for an entirely different project. In effect, petitioners are asking this Court to withhold action on the application for the writ of certiorari in this case for an indefinite period of time pending the decision of the Michigan Supreme Court in an entirely different type of action between different parties and involving a different subject matter.

We further wish to point out to this Court that the Michigan Supreme Court in the recent case of *Municipal Investors Association v. City of Birmingham,* 298 Mich. 314, decided June 30, 1941, has decided the same issues that are now raised in the Highland Park case adversely to the bondholders. In the City of Birmingham case bondholders of a paving assessment district sought a writ of mandamus in the Michigan Supreme Court to compel tax officials of the City of Birmingham to levy a reassessment of paving taxes against the property owners of the district in order to pay special assessment bonds. It appears from the record in that case that the great majority of the lots in the assessment district had been bid in by the State of Michigan because of delinquent taxes and that a large pro-

portion of the lots had been sold at Scavenger Sale under the terms of Act 155 of the Public Acts of Michigan of 1937, as amended. Section 9 of said Act provides:

> "Any quit claim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this Act free from any encumbrances. * * *"

The Michigan Supreme Court denied the writ of mandamus on the following grounds:

1. Because the City of Birmingham has no power or authority to levy a special assessment against the land while it is owned by the State of Michigan. This holding was based on the theory that a municipality which is a creature of the state cannot tax the state in the absence of legislation permitting such a tax. There is no such legislation permitting such a tax.

2. Because under the provisions of section 9 of Act 155 of the Public Acts of Michigan of 1937, quoted above, when the property was sold at "scavenger sale" the purchaser took title free and clear of any encumbrances or liens whatsoever. The Michigan Supreme Court further held that when purchasers take free and clear of all liens and assessments the municipalities cannot make a reassessment to pay for an old improvement. The court stated:

> "It should be borne in mind that when the lots in question were sold for delinquencies, upon failure to redeem, the title vested absolutely in the state, with power to dispose of them in any way not contrary to the constitution. Upon resale by the State Land Office Board, a new chain of title originated, evidenced by a quit claim deed, 'free of any encumbrances.' "

The same reasoning applied by the Michigan Supreme Court in the City of Birmingham case applies to the issues

raised in the City of Highland Park case and to the facts in this case because the bondholders here seek to compel the Board of Supervisors and the Drain Commissioner, who are respondents in this case, to levy and collect an assessment to pay for the project here under consideration. This Court will take judicial notice of the fact that in Michigan during the years of the depression subsequent to 1929 a very large proportion of taxable property became tax delinquent and was eventually bid in by the state and title became absolute in the State of Michigan. The records for the various municipalities in the Nine Mile-Halfway Drain District show that in excess of seventy percent (70%) of the property in the district was purchased at tax sales by the State of Michigan, and that the large majority of the said property was subsequently sold at "Scavenger Sale." The above figures are a matter of public record and can easily be verified by petitioners.

We respectfully submit, therefore, that this Court cannot give the bondholders the relief which they seek and still follow the local rule of law established by the Michigan Supreme Court decision in the City of Birmingham case which held that the tax officials cannot be forced to levy and collect taxes or special assessments when title to the great percentage of the property in the assessment district has become absolute in the state or has been purged of all liens and assessments by being sold at "Scavenger Sale."

It appears from the figures stated above as to the percentage of tax-delinquent properties that the taxpayers rather than the real estate operators and the bondholders were the parties most injured by the speculative activities which led to the construction of projects such as the one now before this Court.

Even if this Court were to disregard the law of the case, which this Court cannot do under the authorities, and con-

sider only the equities, it is to be noted that these projects were promotional schemes by real estate subdividers, eager bond salesmen and persons other than the county, the cities and the municipalities upon whom it is now sought to place the burden of paying for the same. We quote, in part, from the opinion of Judge Toms, the visiting Circuit Judge, who not only tried the case in the lower Michigan court but made a personal examination of the project:

> "The Nine Mile-Halfway Drain is not a drain as contemplated by law, but is in fact a *sewer,* the building of which in territories such as this can have no justification either legal or economic. * * *.
> *"The pouring of public money by the million in a district of this character for public improvements which would more than adequately serve an area with ten times the present population constitutes the grossest squandering of public funds which, if it is not, should be criminal."* (Emphasis supplied.)

In this case the judgment of the Circuit Court of Appeals was entered on March 14, 1941. The Petition for Rehearing was filed on April 9, 1941, and denied May 9, 1941. Soon after the date of denial of said Petition for Rehearing, to-wit, June 5, 1941, the Petition for the writ of mandamus was filed with the Michigan Supreme Court in the Highland Park case. An Answer was filed thereto on June 10, 1941, and on June 12, 1941, the Michigan Supreme Court entered its order to the defendants to show cause why the writ should not issue. The same parties who are the petitioners in this cause appear by the same counsel as relators in the mandamus proceedings in the Michigan Supreme Court. Thus petitioners after years of attempting to avoid the effect of the Michigan decision with reference to this project, and after having deliberately sought the jurisdiction of the Federal Courts, and after years of proceedings in these cases in the Federal Courts, are now seeking within

one month after the adverse decision in the Circuit Court of Appeals, to shift back to the Michigan courts. Since the Michigan Supreme Court has already ruled upon the invalidity of the very proceedings now before this Court and has enjoined the collection of taxes to pay for this project, we respectfully submit that this Court should not withhold its denial of the Writ of Certiorari in this case pending the decision of the Michigan Supreme Court in the City of Highland Park case.

CONCLUSION

The first reason advanced by petitioners for granting the writ of certiorari is based upon an alleged violation of the due process clause of the Federal Constitution by the decision of the Circuit Court of Appeals. We have shown that the decision which petitioners seek to review did not deprive petitioners of their rights to due process and that in reality all that petitioners are seeking is a rehearing of matters adjudicated by the court below. Petitioners admit that the second reason advanced is not a proper reason for the granting of the Writ because it deals only with the application of local law by the Federal Court. We have fully answered this second contention and shown substantial evidence to support the decision of the Circuit Court of Appeals. The third reason is based upon a claimed apparent conflict between the decisions of the Circuit Court of Appeals of the Sixth and Eighth Circuits and is not a proper reason because the Circuit Court of Appeals in this case did not make the decision that petitioners claim it did, and even if it be assumed that the court below made a decision in conflict with another Circuit the decision made was based on local law and is proper, because conflicts between Circuits are inevitable if the Fed-

eral Courts are to follow the law of the numerous states, and such conflicts are now permitted under the rule announced by this Court in *Ruhlin v. N. Y. Life Ins. Co., supra.*

It clearly appears from the records and the arguments of petitioners and respondents that petitioners have had their claims and rights finally adjudicated in both the federal and state court.

(a) The bondholders had their full day in court in these proceedings in which they were parties plaintiff, and the Special Master and the District Court made an independent finding of the illegality of the proceedings, which finding was concurred in by the Circuit Court of Appeals in its independent determination that "the proceedings are plainly null and void under Michigan law" and respondents are not estopped from denying the validity of the bonds. The judgment of the Circuit Court of Appeals, which conforms to the law of the state, finally determines the rights and claims of petitioners.

(b) The Circuit Court of Appeals in deciding the local issues properly found in substance that even if it had not made an independent determination of the illegality of the proceedings and the bonds under Michigan law, the bondholders had their day in court in the Township of Lake case where the state court found and decreed the entire proceedings illegal and void for want of jurisdiction in the Drain Commissioner to do what he attempted to do, because under the state and federal authorities cited the Drain Commissioner represented the bondholders in said state court proceedings.

Petitioners have either failed or refused to recognize that this Court in the Erie Railroad case overruled the doctrine of *Swift v. Tyson,* and we suggest that cases simi-

lar to the one at bar were the fundamental reason for the overruling of that doctrine.

The Circuit Court of Appeals in its well considered opinion clearly resolved purely local issues in favor of respondents.

We respectfully submit that there is no merit to petitioners' contentions and the writ sought should be denied.

ALEX. J. GROESBECK,
1801 Dime Bank Building,
Detroit, Michigan,
BERT V. NUNNELEY,
Mount Clemens, Michigan,
Counsel for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile-Halfway Drain District of Macomb County, Michigan,
Petitioners,
vs.
NINE MILE - HALFWAY DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

PETITIONERS' REPLY BRIEF

We are quite familiar with this court's rule 38, and know that the writ of certiorari is sparingly granted. Yet running through the rule is the recognition that lower courts may commit grievous errors which this court should correct. The many cases in which certiorari has been granted and lower courts reversed proves the wisdom of supervisory jurisdiction in this court.

The rule implies that a fair showing of probable error by a lower court upon some question involving a constitutional right, a conflict with local law, or a conflict between the circuits, call for a review. All of these appear in this case.

I.

CONSTITUTIONAL RIGHTS

We think the court must reject the view advanced by respondents that a litigant cannot complain to this court that a court of appeals has denied him due process. If *Hansberry v. Lee,* 311 U. S. 32, had come to this court from a court of appeals, with a decision in identical terms with that rendered by the Supreme Court of Illinois, this court would have given the case the same consideration, the only difference being that it would then have been concerned with the application of the Fifth Amendment instead of the Fourteenth.

Without attempting to define due process, it surely means that a litigant must be given his day in court, with notice of the claim against him and a fair opportunity to be heard. When the court says that he has already had his day in court and must lose his case because some other tribunal has already decided against him in a case in which he is not a party, an appellate court would be remiss in its duties if it refused to at least consider the reasoning on which the lower court arrived at such conclusion.

When it appears that such reasoning is based upon a theory that someone else, whose interests are adverse to the litigant and who was never authorized to represent him in prior litigation, assumed to stand for him in such litigation, an appellate court must closely investigate the

reasoning upon which this unusual representative capacity is based.

In this case it is based upon a theory that one who purchases a bond of a Michigan drain district must deduce from a statute, which requires a taxpayer in a drain district who sues to cancel his taxes to join the drain commissioner, that he is conclusively bound in the future by adjudications made against the drain commissioner in such suits. We submit that there is such a wide gap between the express language of such statute and the interpretation which the court of appeals has placed upon it, that holders of drain bonds who find themselves denied relief because of this interpretation ought to be heard on the proposition that the interpretation is unsound. By Michigan law, the drain commissioner is only representative of the property owners and municipalities within the district, and there is no statute or decision which makes the commissioner a representative of bondholders.

We have already presented our view that the holding of the Circuit Court of Appeals that the state court decree in the taxpayers' case is *res judicata* against bondholders is so enmeshed in the argument of the Circuit Court of Appeals that it is impossible to extricate it, and still be certain that the conclusion would have been the same if this erroneous factor had not been considered (See p. 19 of our first brief).

The additional argument is made that bondholders were represented in the Township of Lake case because the same firm of attorneys which gave an opinion on the validity of the bonds acted as counsel in the Supreme Court for the drain commissioner. It seems incredible that counsel could suppose that a court could obtain jurisdiction of and make a decree binding on bondholders

scattered from Maine to California by the sole fact that the same attorney who had given an opinion to the underwriter of the bonds was employed by the drain commissioner.

II.

CONFLICT WITH LOCAL LAW

Respondents' protest against the course we suggest of awaiting the decision of a case now pending in the Supreme Court of Michigan, which will determine the local law on the questions involved here, is eloquent of their recognition of the error of the court of appeals. They want this case closed so that judges familiar with local law, and who have the last word as to what it is, can say nothing to upset the advantage they now possess.

We think it is trivial to argue that the case of *City of Highland Park, et al., v. Clark, et al.,* which the Supreme Court of Michigan will hear during the month of October of this year, can settle nothing so far as this court is concerned because it involves a different set of bonds. In an appendix to this brief we print a copy of the petition for mandamus filed in the Michigan Supreme Court (omitting exhibits except for the form of the bonds), and the answer to the order to show cause. This is sufficient to show that the crucial questions in this case are before the Michigan court. It must decide whether the drain law permits the building of projects which will afford complete drainage and sewerage service, whether, if such projects are illegal, bond recitals estop the district to assert such illegality against *bona fide* holders of the bonds, whether taxes must be levied to pay such bonds, and whether bondholders are protected by the certiorari provision of the law. It also must decide

whether the decree in a taxpayer's suit is *res judicata* against bondholders. The appendix further refutes the idea that this is a trumped-up case to delay a decision here. Bondholders other than petitioners here, with other counsel representing them, own half of the bonds involved and are entitled to sue for relief. Because they are citizens of Michigan, they must sue in the state court.

The precedent in *American Surety Co. v. Baldwin,* 287 U. S. 156, cited in our fist brief, we think applicable to the point advanced that this court recognizes the desirability of postponing action on an application for a writ until the state court has decided some pending action which will settle local law. The fact that the same parties are involved in the state litigation is of no consequence. What this court apparently desires is a declaration by the state court of last resort of its view on a disputed question of local law. Since our first brief was prepared, other precedents have come to our attention. In *Michalek v. U. S. Gypsum Co.,* 76 Fed. (2) 115, a federal court of appeals had decided that a plaintiff was barred recovery by a local statute of limitations. Plaintiff applied for certiorari on the ground that the statute applied was wrongly interpreted, and that under a proper interpretation his suit was not barred. At the time another case, *Schmid v. Merchants Dispatch and Transportation Co.*, was pending in the state court, which was decided after the petition for certiorari was filed, in which the state court of last resort (270 N. Y. 287) held contrary to the opinion of the federal court of appeals that the statute should not be interpreted in a manner to bar a suit of the nature alleged in the federal court. This court deferred action on the writ for many months, awaiting the decision of the New York court of last resort, and when the same was rendered, promptly reversed the court of

appeals on the ground that it had wrongly interpreted the state statute, *Michalek v. U. S. Gypsum Co.,* 298 U. S. 639, and remanded the case with directions to follow the New York decision.

During the last term of this court similar action was taken in *City Co. v. Stern and Chase Securities Corp v. Vogel,* 61 S. Ct. 823, cases involving the construction of a Minnesota statute of limitations. The court of appeals, in *City Co. v. Stern,* 110 Fed. (2) 601, and *Chase Securities Corp. v. Vogel,* 110 Fed. (2) 607, held that the statute should not be construed as barring plaintiff's claim. In an application for certiorari, petitioners showed that the same question was before the Minnesota court. This court deferred action on the application for ten months. When the Minnesota Supreme Court, in *Pomeroy v. National City Co.,* 296 N. W. 513, decided that the statute of limitations barred a similar claim and disagreed with the court of appeals, this court reversed the court of appeals, saying:

> "The petition for writ of certiorari is granted and the judgment is reversed. *Vandenbark v. Owens-Illinois Glass Co.,* 311 U. S. ..., 61 S. Ct. 347, 85 L. Ed. ..., decided January 6, 1941; *Pomeroy v. National City Co.,* ... Minn., 296 N. W. 518. The case is remanded to the Circuit Court of Appeals for further proceedings with respect to any questions not determined by the Supreme Court of Minnesota in the Pomeroy and Donaldson cases."

This general subject is treated in Robertson & Kirkham *"Jurisdiction of the Supreme Court of the United States,"* Sec. 290, p. 559, and Sec. 301, p. 602.

CF. *Thompson v. Magnolia Petroleum Co.,* 309 U. S. 478, and *Railroad Commission of Texas v. Pullman Co., et al.,* 61 S. Ct. 643.

This practice necessarily accords with the principle of avoiding conflict with state tribunals on matters of state law. Had the court done otherwise and lost jurisdiction, a grave injustice would have been done to parties who had lost their cases in the court of appeals.

When this court decided *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, and overruled *Swift v. Tyson,* 16 Pet. 1, it must have known that its labors would be increased in determining where conflicts existed with state law. The numerous cases decided as a result of the Erie Railroad Company case prove the mass of litigation entailed. While most of the cases on the subject which this court has heard involved an avowed disregard by a court of appeals of some state decision on the ground that it still could exercise an independent judgment, this court cannot draw a hard and fast line so limiting its jurisdiction. Cases are bound to arise where state decisions are so clearly wrongly interpreted, or where applicable decisions are disregarded or ignored on untenable grounds, that courts of appeal must be restrained in the interest of justice. If a litigant in the federal courts in a case brought there on the ground of diverse citizenship is entitled to be judged according to the law of the state, an erroneous construction of such law ought not to be overlooked merely because a court of appeals declares its purpose to abide by such law. If this court were convinced that a court of appeals wrongly applied or construed a decision of this court, while professing to follow it, it surely would not hesitate in an important case to take jurisdiction. We fail to see any fundamental distinction which should cause this court to deny certiorari when the question arises as to whether a court of appeals has actually followed state law.

When a court of appeals announces that it intends to follow state law and its opinion is in conflict with authori-

tative expressions of the state court of last resort, the difficulty may be that it has a wrong conception of how to arrive at a determination of state law. We think that this point is largely the cause of our differences with respondents and the court of appeals. We believe that a brief consideration of this subject with reference to the various points decided will demonstrate the proposition that an erroneous process of reasoning colors the various conclusions reached by the court of appeals on this subject.

1. Whether the Nine Mile-Halfway Drain Is An Improvement Which Could Not Lawfully Be Constructed.

The basic guide on this subject is the statute; next comes its interpretations by Michigan courts. The facts as to how the drain was constructed and the character of the territory are not in dispute; hence the decision as to the drain's legality becomes a pure question of law, and was so treated by the trial court.

At the outset we must note that the court of appeals, while professing to adopt the finding of the trial court as embodied in the confirmed master's report, did not do so. The court of appeals says (980) that the construction is "predominantly for sewer purposes." The confirmed report of the master, however, says (165) that it is impossible to say whether the purpose of removing sewage, or removing storm water, was most fundamental. After stating that the purpose behind the enterprise, meaning, of course, motives of the landowners and engineers, was to provide a "complete system for the removal of sewage and drainage" after laterals contemplated were constructed, the report says:

> "To go behind this finding and attempt to decide which purpose is fundamental is, in my opinion, an impossibility."

The concluding paragraph of the report on this subject contains the following:

> "I cannot go beyond my finding that the Nine Mile enterprise was undertaken for the dual purpose of sewerage and drainage, neither purpose being dominant."

This error by the court of appeals in stating the master's finding is not a trifling inaccuracy, for it is important to know under Michigan law whether sewage removal is actually the predominant or primary purpose. If not, the presumption of legality is not overcome.

The error of the court of appeals, as we see it, is that it ascribes to a decree of the Michigan Supreme Court with respect to this drain a statement of fundamental principles which should guide courts in deciding the issue of whether this is a drain or sewer, no matter what facts are presented or what new principles of law the state court of last resort may have subsequently announced. The fact that a decree has been rendered based on a finding of illegality, unsupported by any reason, causes, in the opinion of the court of appeals, this drain always to be illegal, no matter what facts are shown or who is showing them. On this theory, if a court once held a stream to be navigable upon evidence submitted in one case, no other party could by other evidence, or a showing of other principles of law, convince another court that the finding was incorrect.

The opinion of the Supreme Court of Michigan, in *Township of Lake v. Millar*, 257 Mich. 135, p. 139, shows no more than the following on the subject of illegality:

> "The drain in this case does not fall within the definition of a drain as prescribed by the statute in force at the time the sewer was laid out, established and constructed.

> "When the petition for the drainage district was filed in this case, Act No. 316, Public Acts 1923, was in force. Section 2, Chapter 1, of the act provides:
>
> > 'The word "drain" whenever used in this act shall be deemed to include any water course or ditch, opened or proposed to be opened, and improved for the purpose of drainage, and any artificial ditch or drain, levee, dyke or barrier or tile drain proposed or constructed for such purpose.'
>
> "Act No. 316, Public Acts 1923, was amended by Act 365, Public Acts 1925, which contained the same definition as Act 316, Public Acts 1923."

Two patent errors appear in this statement. First, the quoted clause was not a definition of the term "drain," but merely a statement that for the purpose of the statute it should be deemed to include other things not within the ordinary concept of the term. Second, Act 365 of Public Acts 1925 (see p. 1, appendix to our first brief), did change this clause by adding to it the words, "structures and such mechanical devices as will properly purify the flow of such drains."

Since the Supreme Court of Michigan overlooked the change in this statute which extended the word "drain" to include disposal plants, and the fact that the petition for this drain, filed after the amendment took effect, requested the building of a disposal plant as then authorized (955), the only reasonable inference from these errors is that the court either was not told, or failed to comprehend that these changes of the statute were applicable. Later, when *Detroit Trust Co. v. Dingman,* 291 Mich. 170, came before it, presenting the question of legality of another drain built in the form of an underground conduit, with profuse equipment for receiving and transporting sewage from the entire

area, and also a disposal plant, it recognized the importance of the provision previously overlooked and held the structure legal. This last decision is the best evidence of the present state law on the subject and cannot be brushed aside on the trivial ground that it related to a different drain, or that it failed to expressly overrule what had been said in the Township of Lake case, or by showing, as respondents do, insignificant differences in design and surrounding conditions. When all is said, we think it must be conceded that if these two cases had come before the Michigan court at the same time, the court would not have stultified itself by holding one project a sewer and the other a drain.

2. Effect of Bond Recitals.

The error in the court of appeals' opinion and our adversaries' argument on the effect of bond recitals is in using local authorities which have nothing to do with the subject as a guide for decision. The court of appeals says (985), after citing cases involving only controversies between taxpayers and assessing officials, that "it is the law of Michigan that where projects are illegal not from mere procedural deficiency, but from total lack of authority to construct the projects, bonds issued to defray the expense of the projects are void in the hands of innocent holders." There is no such decision in Michigan, and the court of appeals and counsel point to none. The only case where any effort was made to obtain an adjudication against drain bondholders was *Kinner v. Spencer,* 257 Mich. 142, where the court expressly declined to pass on their rights because they were not parties.

Of the prior decisions from Michigan on which the court of appeals relies, *Clinton v. Spencer,* 250 Mich. 135, and *Kinner v. Spencer,* 257 Mich. 142, are not in point because

there the petition expressly asked for the construction of a sewer. As the drain commissioner's jurisdiction rests upon a proper petition, *Ranney Refrigerator Co. v. Smith,* 157 Mich. 302, there was a want of jurisdiction from inception, thus causing the entire proceedings to be void. This the Michigan court points out in its later opinion in *Kennedy v. Dingman,* 272 Mich. 24, 30. In this and companion cases in this court, no complaint can be made of the petitions. They asked for drains to properly drain the lands. The quotation which the court of appeals takes from *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, and all of respondents' quotations from the same case, appear in a minority oipnion in that case signed by three justices, which the remaining five justices, though concurring in the result, refused to sign. In *Meyering Land Co. v. Spencer,* 273 Mich. 703, and *Detroit Fire & Marine Insurance Co. v. County of Oakland,* 284 Mich. 130, the court merely finds from the evidence before it that sewers, and not drains, were intended, and that the commissioner, therefore, lacked jurisdiction to levy the tax. Respondents (p. 33 of their brief) also ask the court to consider a passage from a dissenting opinion in *Hankinson v. Deake,* 265 Mich. 1, which they think is so important as to call for italics, but they conveniently omit to say that it is found in a dissenting opinion. Also in the quotation on the same page from *Kennedy v. Dingman,* 272 Mich. 24, 30, there are serious omissions from the language of the Michigan court, without any indication that anything has been omitted from the quotation.

What a state court has said concerning the rights of taxpayers to have their taxes cancelled if the improvement is a sewer rather than a drain does not determine what should be said as to the rights of bondholders who bought their securities relying on the recitals therein. It is a fair inference from *Kinner v. Spencer (supra)* that the court recognized that bondholders might have rights and equities

which would require a decision upholding their bonds if their claims were before the court. In the absence of any opinion by a Michigan court as to the rights of such bondholders under those circumstances, the court of appeals and counsel are not following Michigan law when they say that bondholders have no rights, but are merely guessing as to what the Michigan court would say if the question were presented.

There is a marked distinction between these taxpayers' cases and the present bondholders' case. In the former the court was not cognizant of the fact that bonds had been issued with these recitals, and purchased in good faith. It was only rendering judgment on the particular facts before it. What a court decides with an inadequate factual background, and without considering the rights of other parties not involved in the transaction, may be quite different from what it decided with full knowledge of the facts and with all parties represented. It is erroneous to reason in the reverse fashion pursued by respondents and the court of appeals. By this reasoning they start with an inquiry as to whether taxes would be valid for the kind of improvement constructed. Having assumed that the taxes would be invalid, they say that then the bonds must be invalid. Respondents argue that if there was no jurisdiction or authority to levy taxes because the improvement was illegal, then it must follow that all bonds issued by the district, no matter what representations were contained in them, must be invalid. An abundance of court decisions refute the argument. The principle of estoppel in favor of good faith bondholders is now uniformly accepted, which operates to prevent against them the assertion of those facts on which taxpayers could otherwise rely to defeat the levy of taxes.

There being no opinion by a Michigan Circuit or Supreme Court either way on the precise question of whether a drain

district is estopped by its bond recitals to deny that the project for which the bonds were issued was a drain, we must necessarily look to Michigan decisions involving other bond issues where the controversies are as nearly similar as possible.

We have four decisions in Michigan relating to village or city bonds, cited in our first brief, p. 28, which ought to be accepted as close analogies by anyone willing to transform the concrete to the abstract. In Michigan, as in most jurisdictions, the constitution either expressly or impliedly forbids taxation for any but a public purpose. *People v. Salem,* 20 Mich. 452. Taxation for a private purpose or the pledging of credit for such purpose is illegal. It surely is a greater wrong to a taxpayer to impose a tax upon him to enrich some individual or a corporation, than to impose a tax for a public purpose, but under a wrong statute. The four cases we have cited all recognize such illegality, and hold that no one who extends credit to a municipality to enable it to act in this *ultra vires* manner can recover, if he knows the *ultra vires* purpose. But they all also hold that if he extends credit upon assurances of the municipality that it desires the money for a legitimate purpose, he may recover. What happens if he recovers judgment? From almost the beginning of statehood, Michigan statutes have provided that judgments against villages and cities may be certified to some officer, whose duty it is then to levy and spread a tax to pay it. Sec. 14960, Michigan Compiled Laws 1929. Thus the taxpayers in the village or city ultimately must pay a tax which has for its foundation acts of its officials which are wholly beyond their jurisdiction. The thoughtless would say that this is incongruous, but actually it is not. A municipality obtains the power to borrow money for its corporate needs, and in borrowing it must observe common rules of business honesty. People who choose to live in a municipality or own property therein subject to

taxation must pay taxes to discharge debts which the municipality incurs. The tax levied to pay the judgment is not to promote the illegal object which prompted the creation of the debt, but to discharge an obligation imposed on the municipality by its false representations and pretensions. There is nothing strange or unusual in this result. It applies to private corporations, voluntary associations and partnerships. All may be estopped by acts which are performed in the name of the entity, by an agent acting within the scope of his authority.

In asserting impliedly that Michigan law is opposed to this uniform rule, the court of appeals must have failed to recognize in these four cases which we have cited the abstract principles which govern them. It has been misled by a meaningless slogan often asserted by our adversaries that there can be no liability where there is total lack of jurisdiction, without noting that most slogans are only half truths.

The slogan is, of course, true under some conditions. If by total lack of jurisdiction is meant a total absence of any delegated power under all circumstances, which a purchaser of a bond must know, because he is presumed to know the law, it is true. If it means lack of authority in the official who acts for the municipality because he has not been authorized to act for it in the business under consideration, it is also true. But if power has been delegated, to be exercised only on a condition, and the officer authorized to execute the power is the one directed to perform the condition, the representation he makes in the bonds, as agent of the municipality in charge of obtaining the loan, is the representation of the municipality and estops it. The estoppel is not confined to mere procedural defects,—some failure to observe specified formalities. It applies to the most flagrant breaches of the law that can be imagined,—the most absolute abuses of the borrowing power.

The error of the Court of Appeals in rejecting the authority of these four Michigan decisions and advancing two other decisions, *Spitzer v. Village of Blanchard,* 82 Mich. 234, and *First Wisconsin National Bank v. Bessemer Township,* 286 Mich. 426, in support of the conclusion reached, is quite patent. These decisions do not support the claim that borrowing for an illegal purpose, and thus acting without jurisdiction, avoids the estoppel rule. They relate to the question of what facts recited by an issuing officer may not be relied upon. The facts which the officers in these cases recited were entirely outside the scope of authority of the officers. They were conditions required to exist and be known, but the legislature had prescribed other definite and readily accessible sources of information which would disclose their existence or non-existence. The bond purchaser failed to investigate the exclusive source of information prescribed. This is quite different from the facts here. In the drain bonds the matter relates to the acts of the commissioner himself, to the performance of his own duties. He had power and it was his duty to obviate every condition which would make this drain a sewer, to construct it so that no court could say it was a sewer. He represented that he had done so. He certainly had jurisdiction up to the time he began to plan the drain. If what he planned was too deep in the ground, too large, too expensive, too intricate to be a drain, then he should have eliminated the objectionable features. No bond case can be found where an issuing officer, who had power and whose duty it was to make the recitals in the bonds true, is not held to have authority to make the recitals. Throughout the entire brief of respondents, they refer to acts by the drain commissioner and others which they claim were illegal, but which took place after the bonds were sold and the consideration paid. While in taxpayers 'suits the court has at times referred to facts occurring subsequent to the levy of taxes, it has never

laid down any rule that the validity of taxes can be affected by the use to which the improvement has been put. On grounds of simple logic, it is impossible to see how a tax once legally levied, or a bond legally issued, could become illegal by any unlawful acts of the municipality in handling the improvement constructed. At the time the bonds were issued, June, 1926 (934), the drain had not been constructed, and no part of the proceedings taken prior to that time showed any violation of law, or any intent to issue the bonds for a purpose other than drainage within the district, as authorized in the constitution.

We will not enlarge on what we have said in our first brief in regard to the propriety of including in the judgment relief against parties other than the drain district. This is secondary or ancillary to the relief against the district, and entirely proper in an equity proceeding in the nature of mandatory relief, and is not dependent upon anyone being directly estopped other than the district. The relief against the county, townships and individual taxpayers is all based on the obligation of every taxpayer to pay taxes for the discharge of debts of a municipality which levies them, and to refrain from action which will impede tax collections. Confusion is thrown into this proposition by respondents' failure to recognize that at large levies were made against the County and the townships which it was their duty to pay, if the bonds constitute a debt of the district. The County and townships, by their action prior to the commencement of this suit, show their disposition to thwart by every means in their power action on the part of officers to compel them to pay the taxes levied against them. It was proper for the district court to enjoin such action. The officers who must perform ministerial duties to levy and collect taxes have refused to do so, and it was proper to order them to perform their duties. They have no concern with the reasons why the debt is established against the

district. It is as much their duty to levy taxes to pay bonds valid on the ground of the district's estoppel, as it would be if they were held valid on some other ground. *Board of Commissioners, Sante Fe County, v. Territory of New Mexico, ex rel Bird,* 215 U. S. 296.

A consideration of *Cooper v. Little,* 220 Mich. 62, and *Brooks v. Oakland County,* 268 Mich. 637, cited by the court of appeals and respondents, shows their inapplicability to this case. No claim was there made in relation to taxes levied against the county under the drain law; no injunction was asked against it to enjoin wrongful use of judicial process in tax evasion. In the one case, the point involved was whether a suit against a drain commissioner was county litigation so as to relieve the appellant from paying a court fee. In the other, the point involved was whether illegally levied drain taxes could be recovered from the county, because they had gone into funds kept by the county, it appearing that they had been paid out to discharge debts of the district, and that the taxpayer had failed to comply with statutory requirements as to suits to recover taxes alleged by him to have been wrongfully imposed.

3. Effect of Statute Prohibiting Collateral Attack on Drain Proceedings.

Respondents' argument, p. 54 of their brief, that the court of appeals did not err in ignoring the proposition that the certiorari provision of the drain law prohibits collateral attack, wholly misses the point of our argument and fails to meet it. We point to the express terms of the statute, its interpretation at the time the bonds were issued in *Township of Clarence v. Dickinson,* 151 Mich. 270, and *Stellwagen v. Dingman,* 229 Mich. 159, wherein the court declares that the statute forbids all collateral

attack where nothing more than a statutory violation is involved. We concede that after these bonds were issued the court has receded from the view formerly expressed, and now says that statutory violations of a jurisdictional character are subject to collateral attack. The point that they miss is that the Michigan Supreme Court has also held that changes in statutory construction subsequent to the accrual of rights under the prior construction are not applied retroactively to unsettle such rights. We cite two Michigan authorities which so hold, *Pittsburgh etc. Iron Co. v. L. S. Iron Co.,* 118 Mich. 109, 127, and *Donohue v. Russell,* 264 Mich. 217, 219. Respondents do not deny the fact that under the decisions prior to the issuance of these bonds the certiorari statute was interpreted as we contend it was, nor do they deny that in Michigan the rule of forward operation applies where to do otherwise would unsettle vested rights. These Michigan decisions accord with the rule stated in *14 Am. Jur.*, p. 345:

> "The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. To this the courts have established the exception that where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired by a change of construction made by a subsequent decision. * * * The true rule in such cases is held to be to give a change of judicial construction in respect of a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative repeal or amendment; that is, make it prospective, but not retroactive."

The same rule is also stated in quite similar language in *21 C. J.*, Sec. 194, b. p. 329.

Had counsel examined Judge Cardozo's opinion in *Great Northern Railroad Co. v. Sunburst Oil and Refining Co.*, 287 U. S. 358, 364, they would have seen that this is not a peculiar rule in the federal courts, but that it applies quite generally. Certainly if the decisions of a state court establish it in the law of a jurisdiction, *Erie Railroad Co. v. Tompkins (supra)* requires federal courts to follow it.

Respondents urge, however, that to hold the bonds enforceable by applying this statute would result in the imposition of a tax which would be unconstitutional. (See pp. 51 and 55 of their brief.) They cite in support of this, on p. 52, a passage from a minority opinion in *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, and also quote from *Fuller v. Cockerill,* 257 Mich. 35, which they repeat on p. 55.

What constitutional right of a taxpayer could be violated by imposing a special tax on his property for the benefit accruing to it from a sewer? Such improvements certainly are public enterprises and can be the subject of special assessments. The Michigan Supreme Court has twice rejected the proposition that a subsequent amendment of the drain law authorizing the building of sewers and assessments therefor is unconstitutional. *Township of Warren v. Engelbrecht,* 251 Mich. 608; *Gray v. Dingman,* 279 Mich. 62. If this project was a sewer, the commissioner exceeded only a statutory authority and violated no constitutional provision, for the legislature could have declared in 1925, as well as in 1929, that a sewer could be built under the drain law. No intervening change in the constitution had occurred to give the 1929 amendment a constitutional basis, which it would not have had in 1925.

The nature of defects in drain proceedings which at the time these bonds were issued could be urged against the validity of taxes in collateral suits were only those which result from a failure to observe the requirements of due process. A commissioner may act without jurisdiction, as noted in *Township of Clarence v. Dickinson* and *Stellwagen v. Dingman (supra),* without violating due process. What he does may be wrong and without statutory authority, but that does not violate due process. From the time of the passage of the certiorari provision and until *Clinton v. Spencer,* 250 Mich. 135 (decided in 1930), there had been no Michigan decision permitting collateral attack on a drain tax, except where due process was violated. Either there was a lack of notice or fraudulent conduct of the officials in preventing an impartial hearing on some question vital to the taxpayer. It is only in *Clinton v. Spencer (supra), Kinner v. Spencer (supra), Township of Lake v. Millar (supra), Village of Oak Park v. Van Wagoner (supra)* and *Meyering Land Company v. Spencer,* 273 Mich. 703, all decided subsequent to the issuance of these bonds, that the court departed from its earlier rule and permitted an act involving only a statutory violation, unconnected with notice or hearings, to open the door to collateral attack against the express provisions of the statute.

Fuller v. Cockerill (supra) is clearly not in point, for the drain there considered was one proposed under Act 462 of Local Act 1907. This local act applied only to Muskegon County, and contained no certiorari provision or language prohibiting collateral attack. The drain had not been built, contracts had not been let, and the defect urged was that the superintendent of drains was proposing to levy taxes for a drain wholly within a village, to which his territorial jurisdiction did not extend. The

passage from the opinion quoted by respondents is undoubtedly true, for due process in special assessment proceedings requires that decisions be made and acts performed by an officer possesssing territorial jurisdiction. What the superintendent of drains was there proposing to do was the same as if the drain commissioner of Macomb County had attempted to perform the duties of a drain commissioner of another county.

The term "due process" may not be capable of precise definition, but it has never been held to apply where a party whose property may be subjected to a tax has had notice of the proceedings and an opportunity to be heard by a duly appointed officer acting within his territorial jurisdiction. It may have been a technical violation of the law to impose a tax upon the property owners of the drain district for an improvement which did not possess all the qualifications of a drain, but all taxpayers had notice of the proceedings and opportunity to object, and all, by failure to object and to follow same with certiorari proceedings, waived their objection.

III.

FEDERAL COURTS MAY UNDER PROPER CONDITIONS RESTRAIN PARTIES FROM USING STATE COURT DECREES TO IMPEDE TAX COLLECTIONS

It is true that the Court of Appeals does not in its decision expressly hold that it could not restrain the use of state court decrees to impede tax collections, but it is inferable from the opinion that it believes, as respondents contend, that *Erie Railroad Co. v. Tompkins* would now prevent such action. It says (982) that "sweeping injunctions" were issued by the district court, and that its decree is squarely at variance with the decree in the Meyering Land Company case (983).

We are concerned with this point because of the following reasoning. If this court should remand the case on the ground that the court of appeals erroneously decided that the bonds are invalid, we would be faced with the claim, as indicated by respondents in their argument on this point, that the district court erred in issuing these sweeping injunctions. They were necessary for the protection of bondholders, for if Township of Lake and other taxpayers could institute contempt proceedings based on their decrees, should tax officials perform the district court decree, taxes against these particular taxpayers or their lands would be lost, thus diminishing the security on which the bonds rest. From past decisions by this court, we think the most likely course which this court would pursue if it takes jurisdiction and finds error in the Court of Appeals opinion, will be a remand, in which event we think it important that some declaration be made to the effect that the district court had power to make the injunctions as sweeping as it did.

IV.

CONSIDERATION OF OTHER ARGUMENTS OF RESPONDENTS AS TO WHY THIS COURT SHOULD NOT TAKE JURISDICTION

On page 59 of respondents' brief, reference is made to *Municipal Investors Assn. v. City of Birmingham,* 298 Mich. 314, as constituting a reason why this court should not take jurisdiction. There is nothing therein that supports the decision of the court of appeals. As the record now stands, no one knows what the effect of Act 155, Michigan Public Acts of 1937, will be on the collectibility of assessments for this drain. The judgment of the district court does not order officers to impose or collect any taxes which are not collectible under the law, but merely

to exert their powers to the full extent as therein authorized.

There are no facts presented in this case to justify respondents' implication that this drain was the result of unwise "promotional schemes" by real estate subdividers, eager bond salesmen, etc. These proceedings were pending from November 19, 1924 to June, 1926 (950). The cost of publishing various notices exceeded $4000.00 (970). Personal notice had to be given to state and county road officers, and to township officers. There is not the slightest evidence of any imposition on anyone. It was considered a vitally needed public improvement at the time the proceedings were in progress, and the present flourishing condition of the community, with great building activity, could not exist were it not for the improved drainage which this improvement made possible. The real reason for this contest against the bonds is now, as always,—a sordid effort to unload the cost of the improvement upon creditors.

On page 5 of their brief, respondents refer to an advertisement for the sale of bonds in the Centerline Relief Case, Docket No. 290, as though the advertisement were part of the record in this case. The advertisement referred to applies solely to the Centerline case, and is not a part of the drain proceedings or the record in this case.

On page 7 respondents say that a stipulation of counsel in the lower court made the exhibits and testimony in all cases a part of the record in this case. Reference to the stipulation (245) will show that it is limited to the testimony and does not include exhibits.

CONCLUSION

We fail to see how respondents could misconstrue anything said in our petition and first brief to the effect that we deem conflict with local law an improper ground for this application. Rule 38 5b certainly indicates this as a proper ground, and we have invoked it. Too many cases brought to this court from a court of appeals have been reversed, where the only ground for certiorari is conflict with local law, to suppose that this court conssiders the matter closed by a decision of the court of appeals.

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners.

APPENDIX

Copy of Petition and Answer in City of Highland Park, a Municipal Corporation, Nathan Simons and Seymour Simons, Testamentary Trustees of the Estate of D. W. Simons, Deceased, Kenneth M. Keefe, Ernest E. Quantrell and Pelham C. Wilmerding, Relators, v. Earl L. Clark, Drain Commissioner of Oakland County, and Board of Supervisors of Oakland County, Respondents.

PETITION FOR WRIT OF MANDAMUS

To the Honorable Judges of the Supreme Court of Michigan:

The petition of the above named relators shows unto the court as follows:

1. That on June 2, 1927, proceedings were instituted under Act 316, Michigan Public Acts of 1923, and acts amendatory thereof, to establish a drainage district to be known as Royal Oak No. 7 Storm Sewer Drain District, in the Township of Royal Oak, Oakland County, Michigan. Said proceedings progressed in accordance with said statutes and resulted in the building of a drain, the levy of assessments therefor, and issuance of bonds in anticipation of the payment of said assessments. Attached hereto and marked Exhibit A, to which reference is prayed for greater certainty, is an abstract of the proceedings, which includes copies of petitions, orders and notices relating to the establishment of the district, petition for the drain, determination of necessity, first and final orders of determination, and order for the issuance of bonds in the par amount of $191,000.00. In the last mentioned order is the form of the bonds issued and specification of the maturities thereof.

2. The entire issue of said bonds was purchased by Watling, Lerchen & Hayes, of Detroit, Michigan, at a price of par or better and accrued interest, and payment therefor was made to the Treasurer of said County of Oakland. Said bonds were immediately resold by said firm to various investors, and the unpaid bonds are now held by relators. Except as stated in the bonds, parties who purchased the same knew nothing of the purpose of the drain to be constructed with the proceeds thereof, and purchased the same in good faith and in reliance on the matters of fact recited therein. Of the bonds now outstanding, 65 are held by City of Highland Park, which it purchased for its sinking fund during the year 1928, 10 are held by Testamentary Trustees of the Estate of David W. Simons, Deceased, which the said David W. Simons acquired also during the year 1928. The balance of 75 are held jointly by the remaining relators, Kenneth M. Keefe, Ernest E. Quantrell and Pelham C. Wilmerding, who constitute a Bondholders Committee. All relators are either themselves *bona fide* holders of said bonds for value, or acquired them from *bona fide* holders for value.

3. With the proceeds paid for said bonds by Watling, Lerchen & Hayes, the Drain Commissioner of Oakland County constructed the said drain along the route shown in the proceedings, Exhibit A. The structure is in the form of an underground conduit of reinforced concrete and vitrified tile, ranging from 54 inches in diameter to 12 inches in diameter. The drain district is for the most part subdivided, and the drain is laid in streets and alleys except for a portion laid through unplatted acreage. It has all necessary inlets to receive surface water, and has the size and capacity appropriate for removing all surface drainage water in the area, and has served this purpose since its construction. A few houses, which to July 1, 1932 did not exceed 19, have been permitted to connect with it for the purpose of removing household sewage.

4. For a period since May 1, 1931, the bonds have been in default due to the suspension of the levy of installments of the assessment for said drain during the years 1932 to 1936, inclusive. All bonds are now past due and interest is in default since May 1, 1940.

5. After prolonged negotiations for a settlement in relation to the bonds, relators agreed in writing with respondent, Earl L. Clark, Drain Commissioner, and other officers of the County, for a cancellation of 30% of the interest which had accrued on the bonds to May 1, 1940, and for the issuance of bonds to refund the indebtedness. A copy of their agreement is attached hereto and marked Exhibit B, to which reference is prayed. In accordance with said agreement, relators surrendered their coupons to the County Treasurer of said County and consented to an endorsement on their bonds of a receipt for all interest to May 1, 1940, and were paid a sum equal to 70% of the interest thereon which accrued to May 1, 1940.

6. Respondent Drain Commissioner thereupon applied to the Michigan Public Debt Commission for authority to issue refunding bonds, and on February 13, 1941, an order was entered by said Commission authorizing such issue. A copy thereof is hereto attached and marked Exhibit C, to which reference is prayed for greater certainty.

7. Relators are now informed by respondents that they will neither issue such refunding bonds, nor levy any taxes for the payment of the existing bonds. By an exchange of letters between the City Attorney of Highland Park and respondent Drain Commissioner, copies of which letters are hereto attached and marked Exhibits D and E, relators are informed that respondents consider that the existing bonds are invalid and that this is their ground for such refusal.

8. Since respondents, whose duties are to levy and spread taxes necessary to provide funds for the payment of relators' bonds, refuse to do so, and there is no other presently available source of money for their payment, relators are obliged to ask the aid of the court through the issuance of a writ of mandamus, to compel such levy and spread of taxes for said drain as is provided in Sections 4924, 4925 and 4940 of the Compiled Laws of Michigan, 1929. While relators would still be willing to accept refunding bonds as contemplated by the order of the Michigan Public Debt Commission, if same were tendered to them promptly, they are advised and believe that they may not petition for a writ of mandamus to compel the issuance of the same, since the matter of their issuance is discretionary with the Drain Commissioner.

Wherefore, relators, having no other available remedy, pray:

1. That this court issue under its seal a peremptory writ of mandamus directing and commanding the respondents, Earl L. Clark, Drain Commissioner of Oakland County, and Board of Supervisors of said County, to severally and collectively, as provided by Sections 4924, 4925 and 4940, Compiled Laws of Michigan 1929, perform such acts as will result in the levy, certification and spread of all unpaid portions of installments of taxes levied for said drain, and such supplemental or deficiency assessment as shall be sufficient to pay all outstanding bonds of said Royal Oak No. 7 Storm Sewer Drain District.

2. That an order to show cause issue to said respondents, directing them to make answer under oath to this petition, and therein to show cause, if any, why such writ of mandamus should not issue.

City of Highland Park, by Earl B. Young, City Attorney; Nathan Simons and Seymour Simons, Testamentary Trustees of the Estate of D. W. Simons, Deceased, by Levin, Levin & Dill; Kenneth M. Keefe, Ernest E. Quantrell and Pelham C. Wilmerding, by Irvin Long, Elroy O. Jones, Their Attorneys.

Exhibit A, attached to the petiton, is a transcript of the drain proceedings, with some abbreviations. Exhibit A-23 contains the bond form, as follows:

UNITED STATES OF AMERICA

Number 52 — Dollars 1000

STATE OF MICHIGAN
COUNTY OF OAKLAND
ROYAL OAK NO. 7 STORM SEWER DRAIN DISTRICT BOND

KNOW ALL MEN BY THESE PRESENTS, that the Royal Oak No. 7 Storm Sewer Drain District of the County of Oakland, State of Michigan, is justly indebted and, for value received, hereby promises to pay to the bearer hereof the sum of

One Thousand Dollars

lawful money of the United States of America, on the FIRST DAY OF MAY, 1933, with interest thereon at the rate of 5½% per annum, payable semi-annually on May 1 and November 1 of each year on presentation and surrender of the annexed interest coupons as they severally

become due. Both principal and interest of this bond are payable at the GRISWOLD-FIRST STATE BANK, of Detroit, Michigan.

This bond is one of a series of One Hundred Ninety-one bonds of like date and tenor, except as to date of maturity, aggregating the sum of $191,000.00 issued under authority of and in full compliance with the provisions of Act No. 316 of the Public Acts of Michigan, 1923, as amended by Act No. 365 of the Public Acts of Michigan, 1925, and Act No. 331 of the Public Acts of Michigan, 1927.

The principal and interest of this bond are payable out of the installments of drain taxes assessed against the lands in the said district and against the City of Ferndale and the Village of Oak Park at large, in proportion to their respective taxation for such improvement as follows: lands in District 76.0688% City of Ferndale 15.7288% and the Village of Oak Park 8.2024%, and are issued for the payment of the cost of construction of the Royal Oak No. 7 Storm Sewer Drain in the Township of Royal Oak and the City of Ferndale in said Oakland County, under and in pursuance of the statutes aforesaid and by lawful authority, and the amount of said issue does not exceed the aggregate of the installments of such drain taxes levied, and in case the amount available in the drain fund for said drain shall be insufficient to pay the principal or interest of any of such bonds when they become due the same shall be advanced and paid by the County of Oakland out of its general funds and reimbursement to said general fund shall be made out of the drain taxes thereafter collected, provided that such advancement by the County shall not cause the total debt of the County to exceed the constitutional limitation thereof.

It is hereby certified and recited that all acts, conditions and things required to be done, precedent to and in the

issuance of this bond, in order to make it a binding obligation of the Royal Oak No. 7 Storm Sewer Drain District, have been done, have happened and have been performed in due form and time as required by law, and for the prompt payment hereof and of the interest hereon the full faith, credit and resources of said Drain District are hereby irrevocably pledged.

IN WITNESS WHEREOF, the Drain Commissioner of the County of Oakland for and on behalf of said Royal Oak No. 7 Storm Sewer Drain District has caused this bond to be signed by the County Drain Commissioner and countersigned by the County Clerk of said County of Oakland as of the second day of July, A. D. 1928.

.....

Drain Commissioner, Oakland
County, Mich.

Countersigned:

.....

County Clerk, Oakland
County, Michigan

COUPON

No..... ....

THE COUNTY TREASURER, of the County of Oakland, State of Michigan, will pay to the bearer of this coupon at the Griswold First State Bank, Detroit, Michigan, the sum of.....(.....) from the funds of the Royal Oak No. 7 Storm Sewer Drain District in said County, being the semi-annual interest due that day on its Royal Oak No. 7 Storm Sewer Drain District Bond, dated July 2, 1928.

No.....

....

County Clerk County Drain Commissioner

ANSWER TO PETITION FOR WRIT OF MANDAMUS

Comes now Charles L. Wilson, Prosecuting Attorney of the County of Oakland, by Harry J. Merritt, Corporation Counsel, statutory attorney for Earl L. Clark, Drain Commissioner of Oakland County and the Board of Supervisors of Oakland County and makes answer to said petition as follows:

1. They admit the allegations in the first sentence of paragraph one contained.

They deny the allegations in the second sentence in paragraph one, that a drain was built in pursuance of said proceedings, averring affirmatively that a sewer instead of a drain was built and that this Court so determined in *Village of Oak Park v. Van Wagoner,* 271 Mich. 450.

They admit the allegations in the third and fourth sentences in paragraph one contained purport to be copies of petitions, orders, etc. relative to the establishment of a drain district but aver that a drain was not constructed in pursuance thereof but a sewer.

2. They admit the allegations in the first sentence of paragraph two and neither admit nor deny the remaining allegations in said paragraph having no knowledge thereof and leave plaintiffs to their proof thereon.

3. They deny the allegations in the first sentence of paragraph three contained and affirmatively aver that the then Drain Commissioner of Oakland County constructed a sewer.

They admit the allegations in the second sentence of paragraph two contained.

They deny the inference that a drain district exists as alleged in the third sentence of paragraph three, deny that

a drain is laid in the streets and alleys averring the same to be a sewer.

They admit the allegations in the fourth sentence of paragraph three contained but aver that the same is a sewer and has been so held by this Court, and aver that the question as to whether or not the project was a drain or a sewer is *res adjudicata.*

They neither admit nor deny the allegations in sentence five of paragraph three contained having no knowledge thereof and leave plaintiffs to their proofs thereon.

4. They admit that the purported instruments which plaintiffs call bonds have been in default but deny that the instrument is a bond averring that under the Michigan decision and the Federal decisions the bond as such is a void instrument.

5. Defendant Earl L. Clark admits the allegations in paragraph five contained but Defendant Board of Supervisors of Oakland County denies that the agreement was executed with their authority or approval, affirmatively averring that it was beyond the scope of authority of the Drain Commissioner or the Board of Auditors, they being ministerial officers, and that such an agreement is void, without authorization of law and contrary to public policy.

6. Defendant Earl L. Clark admits the allegations therein contained but Defendant Board of Supervisors of Oakland County deny that such activities of the Drain Commissioner were with their approval or authority, that his activities in that connection were unauthorized, beyond the scope of his authority and of no force or effect as far as the Board of Supervisors of Oakland County are concerned.

7. They admit the allegations in paragraph seven contained.

8. They deny that there is any duty on their part to spread taxes in connection with said illegally constructed sewer, admit that they refuse to do so and affirmatively aver that it is their duty to so refuse, admit that there is no money presently available for payment but deny that this Court should issue its writ of mandamus to compel any levy or spread of taxes to provide money for an illegal project. They deny that either the Drain Commissioner or the Board of Supervisors has any right or duty to continue said contemplated refunding and admit the remaining allegations in said paragraph.

Wherefore respondents pray:

1. That the prayers in paragraphs one and two of relators' prayer be denied.

2. That the petition be dismissed, the matter being *res adjudicata.*

3. That respondents have costs of Court.

CHARLES L. WILSON,
Prosecuting Attorney.
By HARRY J. MERRITT,
Corporation Counsel.

(20)

FILED
NOV 6 1941
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST R. QUANTRELL and PELHAM C. WILMERDING, on Behalf of Themselves and All Other Owners and Holders of Bonds of Nine Mile-Halfway Drain District of Macomb County, Michigan,
Petitioners,
vs.
NINE MILE - HALFWAY DRAIN DISTRICT, a Public Quasi Corporation of Macomb County, Michigan, et al.,
Respondents

PETITION FOR REHEARING ON APPLICATION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners,
Penobscot Building,
Detroit, Michigan.

Interstate Brief & Record Co., Chas Hdqs., 417 Fort St. W., Detroit

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Petitioners,
vs.
NINE MILE - HALFWAY DRAIN DISTRICT, a Public Quasi Corporation of Macomb County, Michigan, et al.,
Respondents

PETITION FOR REHEARING ON APPLICATION FOR WRIT OF CERTIORARI

The above petitioners hereby respectfully petition the Court to grant a rehearing on the petition for certiorari heretofore denied October 13, 1941, for the following reasons:

1. The decision of the Court of Appeals, Sixth Circuit, entitled *Bloomfield Village Drain District, et al., v. Keefe, et al.*, 119 F. (2) 157, conflicts with local law in the particu-

lars set forth in paragraph 2 of the reasons relied upon for allowance of writ in the petition for certiorari.

2. The Supreme Court of Michigan will, within a short time, decide a case which presents identical questions of law, which decision will be conclusive as to the applicable principles of law governing this case, and this Court should await such decision.

This motion is based upon the records and files herein and accompanying brief.

Counsel for petitioners hereby certify that this petition is presented in good faith and not for delay.

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

———

The accompanying motion is confined to those points which have to do with local law and on which federal courts cannot exercise an independent judgment. The petition for certiorari in paragraph 2 of the reasons relied upon for allowance of the writ sets forth the particulars on which petitioners believe that the Court of Appeals came to a conclusion opposed to local law. Briefly these points of conflict are: (a) holding the improvement is illegal under Michigan law, (b) holding that the bond recitals do not protect *bona fide* holders of the bonds against the claims of illegal action by the drain district and drain commissioner, (c) holding that estoppel of the drain district to plead illegality does not establish the duty of officers and others to provide funds for bond payments, (d) ignoring the point that under the drain law and interpretations in effect when the bonds were issued collateral attack was barred.

By prior proceedings herein, and particularly by petitioners' motion to enlarge the time for filing a petition for rehearing, this court was advised that a case will soon be decided by the Supreme Court of Michigan in which points a, b, c and d are involved. We refer to *City of Highland Park, et al. v. Clark, et al.,* which has now been orally argued, and in which briefs have been filed. The opinion of the Michigan Supreme Court can now be expected within a few days or weeks.

While no one, except the Michigan Court, knows what the decision in the City of Highland Park case will be, we believe it must definitely declare the law of Michigan as to the kind of a drainage improvement the drain commissioner was authorized under the Michigan Drain Law to build, and even if it is decided that the drainage improvement there involved, which is similar to those involved in this and companion cases, was an illegal sewer rather than a drain, it must still decide whether the bonds are enforceable on the principle of estoppel.

The Court of Appeals' decision is based upon its conception of Michigan law. It in effect assumes that the Michigan court of last resort would be required to decide the case as it decided it. Within a very short time we will know whether this assumption is correct. Respondents in this case must recognize that the forthcoming opinion of the Michigan Court must either confirm what the Court of Appeals has decided, or flatly contradict it, for they have filed briefs *amici curiae* urging that the Court of Appeals' opinion ought to be followed.

The granting of a rehearing can visit no harm upon respondents, for if the Michigan Court decides as they urge it to do in their briefs *amici curiae,* it will end this case. As no money or property is withheld from respondents they will have suffered no loss as a result of the brief period of time during which the matter remains undecided. On the other hand, holders of these bonds will suffer great and irreparable loss if the Michigan Court should flatly disagree with the Court of Appeals and hold that it has wrongly construed local law, and the decree of the latter court stands without an opportunity to review. It will then mean that bondholders' rights have been judged by a conception of law proven to be erroneous.

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners.

Office - Supreme Court, U. S.
FILED
NOV 8 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile-Halfway Drain District of Macomb County, Michigan,

Petitioners,

v.

NINE MILE - HALFWAY DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan; CARL B. BRANDENBURG, County Treasurer of Macomb County; GUY L. BROWN, County Clerk of Macomb County; BERT ENGELBRECHT, Drain Commissioner of Macomb County; SHERWOOD BENNETT, Comptroller of Macomb County; BOARD OF SUPERVISORS OF MACOMB COUNTY; TOWNSHIP OF LAKE, a municipal corporation; TOWNSHIP OF WARREN, a municipal corporation; TOWNSHIP OF ERIN, a municipal corporation; CITY OF EAST DETROIT, a municipal corporation; VILLAGE OF CENTERLINE, a municipal corporation; ALFRED POERSTER, CHRIST F. KAISER and HENRY JACOBS, Taxpayers, and ALEXANDER L. WALTENSPERGER and NELLIE WALTENSPERGER, Taxpayers,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI.

ALEX. J. GROESBECK,
1801 Dime Bank Building,
Detroit, Michigan,
BERT V. NUNNELEY,
Mount Clemens, Michigan,
Counsel for Respondents.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI.

We respectfully submit that Relators' Petition for Rehearing after denial of Petition for Writ of Certiorari should not be granted, for the following reasons:*

1. In this case the Petition for Certiorari was denied and, in accordance with Rule 34, no mandate was issued,

---

*This case is one of five related cases, this Court Docket Nos. 287 to 291, and the reasons stated in this Brief in opposition to the Petition for Rehearing apply equally to all of said cases.

but the Clerk forthwith entered an order to the effect that the Petition for Certiorari was denied and notified the court below and counsel of record. The court below being the Circuit Court of Appeals, Sixth Circuit, in accordance with the Rules of the Sixth Circuit Court of Appeals, issued and filed with the District Court of the United States, Eastern District of Michigan, Southern Division, the following mandate:

> "It is now Ordered, Adjudged and Decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed and the bill of complaint is dismissed."

The said mandate was filed in the District Court on October 22, 1941. The Bill of Complaint in this case and all companion cases stands dismissed and injunctions which were predicated upon the bills of complaint were dissolved upon the dismissal of the respective complaints.

2. The identical argument now made by petitioners in this Petition with reference to the case of *Highland Park et al. v. Clark et al.*, was made by counsel in their Petition for Certiorari—pages 14 and 43, was fully answered in Respondents' Brief in opposition to the petition for certiorari—pages 59 to 63, and was again raised in Petitioner's Reply Brief—pages 4 to 7, and in Petitioners' Motion to Enlarge Time for Filing Petition for Rehearing, pages 1 to 3. All the points now advanced in support of this Petition were strenuously argued by counsel for petitioners in their briefs in support of the Petition for Certiorari, and this Court was fully apprised of all the facts connected with the said case of *Highland Park v. Clark.* In the case of *Giant Powder Co. v. Cal. Vigorit Powder Co.*, 5 Fed. 197, 201, the Court stated:

> "A new hearing should not be had simply to allow a re-hash of old arguments."

To bring before this Court the true facts in connection with the case of *City of Highland Park v. Clark,* we wish to give this Court a brief history of the circumstances which led to the filing of the said mandamus action. On May 17, 1935, the Michigan Supreme Court decided the case of *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, and held the same drain proceedings now involved in the City of Highland Park case to be illegal and enjoined the collection of taxes to pay for the project. Shortly after the said Michigan decision the bondholders committee which had been organized in 1932 for the purpose of creating diversity of citizenship to give the Federal Courts jurisdiction started the case of *Keefe, et al., Plaintiffs, v. Royal Oak Storm Sewer Drain District No. 7, et al., Defendants,*—Equity Cause No. 7564, in the United States District Court for the Eastern District of Michigan, Southern Division. The relief sought in said Federal Equity cause No. 7564 was to have the decision of the State Court in the Village of Oak Park case decreed by the Federal Court to be of no force and effect, to have the bonds decreed valid and to enforce the levying of assessments. The party plaintiffs in said case were the same bondholders' committee who are the plaintiffs in these cases. Said Equity Cause No. 7564 was at issue in the Federal District Court; all the interested parties were represented, depositions had been taken, and the case could have been tried in the Federal Court. However, after the decision of the Circuit Court of Appeals in these cases, which involve substantially identical issues, the bondholders' committee on the sworn representation to the Federal District Court that the situation between the parties to that case had been changed by the execution of a refunding agreement, obtained a dismissal of said cause No. 7564 on June 6, 1941. The following day, June 7, 1941, the *City of Highland Park v. Clark* case was filed in the Michigan Supreme Court. Said suit was filed only against the Drain Commissioner and the Board of Supervisors.

Numerous interested parties, including the Village of Oak Park which had already obtained a decree enjoining the collection of the tax, were not made parties to the suit. The representation upon which the Order of Dismissal of the Federal case was based was not true because at that time the validity of the refunding agreement had been denied and the Drain Commissioner had notified bondholders in a letter dated May 29, 1941, of the impossibility of refunding void bonds.

The above facts are called to the attention of this Court so that the purpose of relators in the *Highland Park v. Clark* case in hastily dismissing the Federal suit and bringing said mandamus proceedings before the Michigan Supreme Court may be understood. The same parties who are the petitioners in these proceedings appear by the same counsel as relators in the Michigan mandamus proceedings. Thus, the said bondholders' committee, after years of attempting to avoid the effect of the Michigan decisions with reference to the said project and after having deliberately sought the jurisdiction of the federal courts and after years of proceedings in the federal courts, are now seeking within one month after an adverse decision by the Circuit Court of Appeals in these cases to shift back to the Michigan Supreme Court. The decision of the Michigan Supreme Court in the Village of Oak Park case is a final adjudication holding that the identical proceedings involved in the Highland Park case are illegal, that the doctrine of estoppel does not apply where there is a complete lack of jurisdiction and that the collection of taxes to pay for the project would deprive the taxpayers of their property without due process of law. Petitioners should not now be permitted to delay the proceedings in this Court by what, in effect, amounts to a request to the Michigan Supreme Court for a rehearing upon the same issues which were adjudicated by the Michigan Supreme Court

in the Village of Oak Park case. We, therefore, respectfully submit that the circumstances which surround the starting of the Highland Park case in the Michigan Supreme Court are not such as would appeal to the conscience of this Court, and we submit that not only because the Michigan law followed by the Circuit Court of Appeals is clear-cut upon the issues herein, but also because by their actions in starting the Highland Park case in the Michigan Supreme Court after dismissing an identical action in the Federal Court, petitioners are not entitled to any consideration on the part of this Court in the way of delaying the decision of this Court pending the outcome of the said Highland Park case.

In view of the fact that this Court denied the Petition for the Writ of Certiorari with full knowledge of the pendency of the said *Highland Park v. Clark* case, that no new issue or fact has been raised which would entitle petitioners to a reconsideration of its Petition for Certiorari by this Court, that it is not the purpose of a rehearing to review questions which have been previously fully presented to the court, that the order of this Court has been entered, the mandate of the Circuit Court of Appeals denying the bill of complaint has been issued, filed with the District Court and acted upon, that the litigation concerning this project has been pending for in excess of ten (10) years and that there ought to be some end to litigation, we respectfully submit that this Court should deny the Petition for Rehearing.

ALEX. J. GROESBECK,
1801 Dime Bank Building,
Detroit, Michigan;
BERT V. NUNNELEY,
Mount Clemens, Michigan,
Counsel for Respondents.

Office - Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile Halfway Drain District of Macomb County, Michigan,
Petitioners,
vs.
NINE MILE HALFWAY DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REHEARING

DAVID M. WOOD,
RAYMOND K. DYKEMA,
2746 Penobscot Building,
Detroit, Michigan,
Counsel for Petitioners.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

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Respondents

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REHEARING

In the companion cases of *Keefe, et al., v. Martin Drain and Branches Drain District*, No. 289, and *Keefe, et al., v. Centerline Relief Drain District*, No. 290, counsel for respondents have brought to the court's attention the recent opinion of the Supreme Court of Michigan in *City of High-*

land Park v. Clark. In a reply brief in *Keefe v. Martin Drain and Branches Drain District* we have set forth reasons why this court should defer action on the pending petition for rehearing until it is known that the opinion of the Michigan Supreme Court is final and official. We refer to what was there said, and urge that the same reason for deferring action on the petition applies here.

We also wish to point out in this case,

THAT EVEN IF THE STATE COURT'S OPINION REMAINS IN SUBSTANTIALLY THE SAME FORM AS THE ONE ON FILE IT DEMONSTRATES THE TRUTH OF PETITIONERS' CONTENTION THAT THE LOWER COURT ERRED IN DETERMINING LOCAL LAW

(a) An essential and necessary step in the lower court's reasoning was that the decision and decree of the Michigan Courts relating to the Nine Mile Halfway Drain in *Township of Lake v. Millar,* 257 Mich. 135, was *res judicata* against bondholders in this case. The lower court said (R. 986):

> "The officers of the drain district represented all creditors of the district, and thus appellants (appellees) had notice and were given their day in court in those cases."

Because of this the lower court said later "Those cases are *res judicata* of the determinative facts of this controversy." This statement as to a relationship between bondholders and the officers of the drain district is flatly contradicted by the Michigan Court. It says (see page 9 of Respondents' Brief):

> "We do not say that the Village of Oak Park case *(supra)* is *res judicata* of the rights of relator bondholders, nor do we hold that they had their day in court, through representation of the drain commissioner who was the defendant in that action."

While it says that the Oak Park case which inolved the same improvement is a precedent which it should follow that reasoning cannot be applied here. We have here a vastly different presentation of facts concerning the nature of the improvement. As the Michigan Court recognized that a different presentation of facts than that which had before been shown would cause a different result, the lower court ought to have considered the facts in regard to the Nine Mile Halfway Drain in the light of all decisions of the Michigan Supreme Court involving the legality of drainage projects. The Master correctly recognized that *Township of Lake v. Millar (supra)* was of no value as a precedent because of the paucity of consideration there given to the character of the improvement (R. 154), and that he must consider the evidence before him. His opinion of illegality, and the district judge's confirmation of his report, were properly questioned below by petitioners on the ground that the evidence was insufficient to support the conclusion. It was the duty of the lower court to investigate and pass upon this. Its refusal to do so could only have resulted from a conclusion, now proven erroneous, that the matter was *res judicata* by the decree in *Township of Lake v. Millar (supra)*. Had it not been for this error, the lower court, following its own precedent in *Royal Oak Drain District v. Keefe,* 87 F. (2) 278, would undoubtedly have considered the sufficiency of the evidence, and we believe would then have held that in the light of all decisions in Michigan relating to the sewer-drain contr versy that illegality of the structure was not established.

(b) The lower court rejected the authority of *Thompson v. Village of Mecosta,* 127 Mich. 522, and *Schmid v. Village of Frankfort,* 131 Mich. 197, saying that "the village themselves took part in the false recital" (R. 986). The Michigan Supreme Court, however, accepts these cases

as authorities which would rule the decision in all cases involving drain bonds, *bona fide* held, where the bonds themselves contained no notice of infirmity. It held that the Royal Oak No. 7 Storm Sewer Drain District bonds contained this notice of infirmity because of the title of the improvement. It must necessarily follow from this that had the words "storm sewer" been omitted from this title, the decision would be the other way. It emphasized by quotation from the Thompson case, the following: "A *bona* fide purchaser for value had a right to rely upon the statement of the board, appearing on the bond, that it was issued to borrow money under this act, for lawful purposes, i. e., public improvements." (See p. 11 Respondents' Brief. in *Keefe v. Martin Drain and Branches Drain District.*) In this case the title of the proceedings and bonds, and all references therein, indicated that the improvement contemplated would be a drain (R. 22, 950). These bonds carried on their face a false pretense, in that they certified that the money was to be spent to build a drain, and that all acts, conditions, etc., existed and had been performed to make them binding obligations.

(c) Recognition of the authority of *Thompson v. Mecosta (supra),* and other Michigan cases of like import and the authorities cited therein, necessarily controverts the lower court's theory that the recitals in these bonds did not have such force as to make them inconsistent with the claim that the improvement was not to be a drain. In the Thompson case, the recital was merely compliance with the governing law. Here the bonds not only recite compliance, but add the further statement of the due happening, existence and performance of all acts and events essential to their validity.

It cannot be doubted that had the lower court known the views of the Michigan Court of last resort, as expressed

in this opinion, it would have eliminated from its opinion its determination that a decree in a prior suit was *res judicata,* that a drain districts bonds with recitals such as these do not carry a false pretense, and that such bonds would not estop the district to assert that the improvement built with their proceeds was not a drain. With these propositions eliminated, we believe it logical to infer that the lower court would have affirmed the district court's decree.

We submit that the opinion of the state court demonstrates vital errors by the lower court in its assumption that local law required it to reverse the district court in this case. Local law, in its application to drain bonds and the facts in this case, is now known, or will be as soon as this opinion of the Michigan court becomes final and official. Therefore, the petition for rehearing and petition for certiorari should be granted, and the case reversed and remanded to the lower court, with directions to decide the case in accordance with the now known principles of local law.

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners.

MAR 27 1942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile-Halfway Drain District of Macomb County, Michigan,
Petitioners,

v.

NINE MILE - HALFWAY DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan; CARL B. BRANDENBURG, County Treasurer of Macomb County; GUY L. BROWN, County Clerk of Macomb County; BERT ENGELBRECHT, Drain Commissioner of Macomb County; SHERWOOD BENNETT, Comptroller of Macomb County; BOARD OF SUPERVISORS OF MACOMB COUNTY; TOWNSHIP OF LAKE, a municipal corporation; TOWNSHIP OF WARREN, a municipal corporation; TOWNSHIP OF ERIN, a municipal corporation; CITY OF EAST DETROIT, a municipal corporation; VILLAGE OF CENTERLINE, a municipal corporation; ALFRED FOERSTER, CHRIST F. KAISER and HENRY JACOBS, Taxpayers, and ALEXANDER L. WALTENSPERGER and NELLIE WALTENSPERGER, Taxpayers,
Respondents

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI.

ALEX. J. GROESBECK,
1801 Dime Bank Building,
Detroit, Michigan,
BERT V. NUNNELEY,
Mount Clemens, Michigan,
Counsel for Respondents.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

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Respondents

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI.

On October 13, 1941 this Court denied a petition for certiorari seeking to review an order of the Circuit Court of Appeals (Sixth Circuit) of March 14, 1941 dismissing

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*This case is one of five related cases, this Court Docket Nos. 287 to 291, and the reasons stated in this Brief in opposition to the Petition for Rehearing apply equally to all of said cases.

the Bill of Complaint in this and four associated cases, upon which cases rehearing was denied by the Circuit Court of Appeals on March 9, 1941. Subsequently this court denied a motion to extend the time in which to file a petition for rehearing and petitioners then filed the pending petition for rehearing.

THE PETITION FOR REHEARING SHOULD BE DENIED BECAUSE THE DECISION OF THE CIRCUIT COURT OF APPEALS HAS BEEN APPROVED BY THE MICHIGAN SUPREME COURT

It has always been respondents' contention that the only substance to the petition for rehearing was a request by petitioners for this court to withhold passing upon the petition for rehearing while petitioners' counsel attempted to have the Supreme Court of the State of Michigan change the law of the State. We pointed out in previous briefs filed in this Court how the Highland Park case was commenced in the State court subsequent to the dismissal of the Bill of Complaint in this case by the Circuit Court of Appeals. Petitioners' counsel's first request was that this court withhold passing upon the petition for rehearing until the State court decided the Highland Park case. In respondents' briefs filed in associated cases, this court docket No. 289 and 290, we advised this court that the Highland Park case had been decided by the State court, and included a copy of the court's opinion in the brief.* Peti-

*The copy of the State Court's opinion attached to previous briefs filed were received by counsel through the mail from the Clerk of the Michigan Supreme Court. We attach hereto as Exhibit A, a certified copy of the State Court's opinion to eliminate any question as to what the State Court held.

tioners' counsel then requested this court to withhold passing upon the pending petition for rehearing in these cases until their petition for rehearing in the Highland Park case was decided by the State Court. Briefs were filed by opposing counsel in the Highland Park case requesting a rehearing in the State court and briefs in opposition to the rehearing were filed *amici curiae* by respondents in this case. *On the 17th day of March the State court denied the petition for rehearing in the Highland Park case.* The denial of the petition for rehearing by the State court supports our contention that the petition for rehearing herein should be denied. There can be no dispute about this because this is the position of petitioners as stated in their briefs in this court as follows:

> "The Supreme Court of Michigan will, within a short time, decide a case which presents identical questions of law, *which decision will be conclusive* as to the applicable principles of law governing this case, and this Court should await such decision."
>
> * * * * *
>
> "Respondents in this case must recognize that the forthcoming opinion of the Michigan Court must either confirm what the Court of Appeals has decided, or flatly contradict it, for they have filed briefs *amici curiae* urging that the Court of Appeals' opinion ought to be followed. The granting of a rehearing can visit no harm upon respondents, for if the Michigan Court decides as they urge it to do in their briefs *amici curiae, it will end this case.*"

It now clearly appears that petitioners' attempts to convince the Michigan Supreme Court that it should repudiate the State court's holdings, upon which the United States Circuit Court of Appeals (Sixth Circuit) grounded its decision in these case, have failed. The mandamus relief sought in the Highland Park case was similar to the relief

sought in this case and the Michigan court unanimously denied the writ and grounded its decision upon the same law upon which the Circuit Court of Appeals based its decision in this case, namely:

(a) That under Michigan law the controlling legal distinction between sewers and drains is the primary purpose of the structure.

(b) That the Drain Commissioner's jurisdiction is limited to the building of a drain and where the Drain Commissioner exceeds his jurisdiction and constructs a sewer, the entire proceedings pursuant to which the bonds are issued, are void and the doctrine of estoppel by recitals does not apply.

To bring clearly before this Court the analysis of the State court's decision which the Michigan Supreme Court had before it when it denied the petition for rehearing, we quote from our brief, as *amici curiae,* in the State court:

(Excerpt from Brief of Amici Curiae in opposition to Petition for Rehearing in case of Highland Park v. Clark)

Section I of Petitioner's Brief is entitled "Significance of Term 'Storm Sewer Drain' used in the Proceedings and Bonds" and is an attempt to twist the language of the Opinion of this Court around to say what in reality the Court did not say at all.

Petitioner's attempt to upset the decision of this Court upon the basis of the allegation that this Court gave an improper emphasis to the word "storm sewer" in the course of its Opinion, appears trivial in view of a proper analysis and understanding of the bases of this Court's decision. The decision of this Court was based upon the following holdings of the Court and no

amount of argument on the part of the Petitioners can change the correctness of the holdings nor enable the bondholders, in view of these holdings, to enforce the collection of taxes to pay for bonds issued in the course of proceedings which were void for want of jurisdiction. This Court held:

> 1. "Careful consideration requires the conclusion that decision in the instant case is governed by the reasoning in *Village of Oak Park v. Van Wagoner,* 271 Mich. 450. Although five members of the court concurred specially in the opinion in that case, nevertheless the court was unanimous in holding that the Royal Oak No. 7 project was a sewer and not a drain; that the defendant drain commissioner was wholly without jurisdiction in the premises, and that therefore the entire proceedings were void and subject to collateral attack. In arriving at this conclusion, the court unanimously concurred in the statement that, 'The acts of the drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law.' "
>
> (a) "We held unanimously that all assessments levied against the village should be cancelled and set aside and permanently restrained the drain commissioner from collecting, or attempting to collect, the same or any portion thereof."
>
> (b) "If the levy of a tax in 1935 'would constitute the taking of property without due process of law,' the levying of a tax now would also constitute the taking of property without due process of law."
>
> (c) "Since we held in 1935 that it was illegal to levy and collect any tax assessed as

> a result of this project, under the doctrine of *stare decisis* we must hold now that it is illegal to levy and collect a tax to pay outstanding bonds issued incident to the same project."

In view of the above holdings of this Court it would be impossible for Petitioners, under any circumstances, to force the levy and collection of a tax to pay for the outstanding bonds. Certainly the relief by mandamus sought by Petitioners cannot be granted in the face of the holding and decree of this Court in the Village of Oak Park case, upheld in this case, cancelling and setting aside the assessments and permanently restraining the collection or attempt to collect taxes to pay for this project;

> 2. "Certainly the board of supervisors of Oakland County cannot be estopped by the drain commissioner of that county because he had no legal authority whatever to speak for them and the counter signature of the county clerk was merely a ministerial act."*

The effect of the above holding of the Court was to eliminate any possibility that the county or county officers could be held liable under the estoppel doctrine;

> 3. "The Drain Commissioner had no authority to build a *sewer* drain. He was wholly without jurisdiction and his void acts cannot estop the drain district, even though it can be argued that the taxpayers of the drain district have profited by his unauthorized acts."

In the above language this Court clearly states the applicable, fundamental rule of estoppel. This Court clear-

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*This statement of the Michigan Supreme Court is in direct support of the holding of the Circuit Court of Appeals in these cases that no estoppel arising out of the acts of the drain commissioner could run against the townships, municipalities or county officers. (119 Fed. (2d) 163).

ly and concisely stated that there can be no estoppel against the Drain District because the Drain Commissioner built a sewer which he had no authority to build and because the acts of the Drain Commissioner were void for lack of jurisdiction.

Regardless of whatever interpretation Petitioners seek to give to the emphasis placed by this Court upon the word "sewer" the fact still remains that this Court based its decision upon the fact that there was no estoppel of the Drain District, because the drain commissioner was wholly without jurisdiction in the premises, and that therefore the entire proceedings were void;

> 4. (From the concurring Opinion of Justice Boyles):
>
> "We repeat that the controlling legal distinction between sewers and drains is the primary purpose of the structure which determines its character regardless of what may be purely incidental purposes. The Federal courts likewise recognize the Michigan rule, here repeated, that the drain district or municipality is not estopped from denying validity of a bond issue on the ground of total lack of jurisdiction."

Justice Boyles flatly bases his concurring Opinion on the ground that the Village of Oak Park decision is controlling and reiterates the primary purpose rule and the "Michigan" rule of law that the doctrine of estoppel does not operate in favor of bondholders against the Drain District or a municipality whenever there is a complete lack of jurisdiction. This opinion, which was concurred in by all the other members of the Court, is complete in itself and completely refutes the arguments made by petitioners. *This court having determined the entire proceedings to be invalid for want of jurisdiction,*

further reference to storm sewer drain, is not a necessary part of the court's decision in passing upon the estoppel question. The decision of this court would have been the same and must of necessity be the same under the circumstances as if no reference were made thereto.

(End of excerpt from Respondents' Brief in opposition to Rehearing in Highland Park case.)

ANSWER TO PETITIONER'S ERRONEOUS ARGUMENTS

Now that petitioning counsel are confronted with their requested decision in the Highland Park case and with the real basis of the State court's decision, they have resorted to clearly erroneous arguments as follows:

(1) It is claimed that the State court in the Highland Park case ruled against the *res adjudicata* theory adopted by the Circuit Court of Appeals. There is no merit to this argument because the Michigan court found it unnecessary to pass upon the *res adjudicata* question, the language of the State court being:

> "We do not say that the Village of Oak Park case is *res adjudicata* of the rights of bondholders." The State court found it unnecessary to pass upon the *res adjudicata* question because it held that under the rule of *stare decisis* the Village of Oak Park case was binding and "that the drain district or municipality is not estopped

from denying the validity of the bond issue on the ground of total lack of jurisdiction."

It is apparent from an examination of the record and the opinion of the Circuit Court of Appeals in these cases that the opinion of the court would have been the same, even though the court had not held that the previous decisions of the State court, determining the proceedings to be illegal and void, were *res adjudicata* because of the independent findings in these proceedings. The Special Master, the District Judge and the Circuit Court of Appeals independently found that the entire proceedings were illegal and void under the law of the State and made this finding from independent evidence presented by the record. We repeat that these findings of the Federal Court stand by themselves irrespective of the *res adjudicata* issue and fortified by the decision of the State court that its previous decisions under similar facts and circumstances are *stare decisis*.

(2) Petitioners again state that the Circuit Court of Appeals erroneously rejected the case of *Thompson v. Mecosta*, 127 Michigan 522 and similar cases, and here again they have fallen into the fundamental error apparent throughout all their briefs, in that they have failed to distinguish cases like the Mecosta case, where there was no holding of complete lack of jurisdiction in the premises, from cases like the present drain cases, where the State court has repeatedly held as did the Circuit Court of Appeals, that the Drain Commissioner was wholly without jurisdiction in the premises.*

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*The Drain Commissioner's jurisdiction is limited by the State Constitution, the statutes from which he derives his authority and the *stare decisis* limitations of the Michigan decisions. See Respondents' Brief in Opposition to Petition for Certiorari, page 47, and Respondents' Reply Brief, page 10.

(3) The petitioners have placed an erroneous construction upon the State court's use of the words "storm sewer" in their interpretation of the State court's opinion on the estoppel question.*

In an earlier part of this brief we have pointed out fully that the true basis of the court's decision was the lack of jurisdiction in the Drain Commissioner to do what he attempted to do and that once the State court determined the entire proceedings to be invalid for want of jurisdiction further reference to "storm sewer" drain is not a necessary part of the court's decision in passing upon the estoppel decision. The decision of the State court would have been the same and must of necessity be the same under the circumstances as if no reference were made thereto. The tax assessments in the Highland Park case were wiped out and decreed illegal and void in the Village of Oak Park case** because the entire proceedings were found to be illegal and void for want of jurisdiction *and not because of any statement contained in the bond.* Likewise the assessments in the cases before this court were wiped out and decreed illegal and void under the law of the State because the Drain Commissioner was entirely devoid of jurisdiction in the premises.

The Circuit Court of Appeals in deciding these cases quoted with approval the following language of the Michi-

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*It is evident that the Michigan Supreme Court was not impressed with the argument of petitioners on this point because, although petitioners strenuously argued the point in their brief, a copy of which was attached to Petitioners' Reply Brief on their Petition for Rehearing in the Martin Drain case, this docket No. 289, the Michigan Supreme Court promptly denied their petition for rehearing.

**The case of *Village of Oak Park v. Van Wagoner*, 271 Mich. 450, is the case which petitioners in the Highland Park case sought to overrule.

gan Supreme Court in the said case of *Village of Oak Park v. Van Wagoner:*

> "The acts of the Drain Commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law. Under such circumstances, no estoppel would arise to bar an action to restrain the collection of the void tax."

In the City of Highland Park case the Michigan Supreme Court reaffirmed its decision in the Village of Oak Park case and quoted with approval the above language, which had been quoted by the Circuit Court of Appeals. In addition thereto, the Michigan Supreme Court in holding that the drain district or municipality is not estopped from denying the validity of a bond issue on the ground of total lack of jurisdiction *stated that the Federal Courts had likewise recognized the said rule and cited in support thereof the Circuit Court of Appeals' decision in these cases.* Petitioners, therefore, are now asking this court to grant a rehearing in this case on the ground that the Circuit Court of Appeals did not properly determine and follow Michigan law, where as a matter of fact the Circuit Court of Appeals in these cases determined what the Michigan law is, based its decision in these cases on what it had determined the Michigan law to be and then *the Michigan Supreme Court put its unanimous stamp of approval on the holding of the Circuit Court of Appeals when it cited with approval the decision of the Circuit Court of Appeals in these cases in support of its own statement that the Federal courts recognize the Michigan rule that estoppel does not apply where there is a complete lack of jurisdiction.*

CONCLUSION

We pointed out in previous briefs that no new issue or fact has been raised which would entitle petitioners to reconsideration of their petition for certiorari by this court and that it is not the purpose of a rehearing to review questions which have been previously fully presented to the court. Counsel for petitioners requested this court to await the decision of a State case commenced after the Circuit Court of Appeals' case was decided. We have pointed out that this was a futile attempt by petitioners to change the law of the State. The State case has now been decided by the State court and a rehearing denied thereon. This decision of the State court, requested by petitioners, reaffirmed the State law upon which the Circuit Court of Appeals based its decision and cited with approval the Circuit Court of Appeals' interpretation of the State law.

We, therefore, respectfully submit that this court properly denied the petition for certiorari and that the petition for rehearing should be denied.

ALEX. J. GROESBECK,
1801 Dime Bank Building,
Detroit, Michigan;

BERT V. NUNNELEY,
Mount Clemens, Michigan,
Counsel for Respondents.

EXHIBIT A

STATE OF MICHIGAN

SUPREME COURT

CITY OF HIGHLAND PARK, a municipal corporation, NATHAN SIMONS and SEYMOUR SIMONS, Testamentary Trustees of the Estate of D. W. Simons, Deceased, KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, Relators,

v.

EARL L. CLARK, Drain Commissioner of Oakland County, and BOARD OF SUPERVISORS OF OAKLAND COUNTY, Respondents.

No. 41,609.

BEFORE THE ENTIRE BENCH:

BUSHNELL, J. Relators, who claim to be bona fide holders for value of bonds issued by Royal Oak No. 7 Storm Sewer Drain District in the Township of Royal Oak, Oakland County, Michigan, seek a writ of mandamus directing and commanding respondents, the drain commissioner of Oakland county and the board of supervisors of that county, to severally and collectively perform such acts as will result in the levy, certification and spread of all unpaid portions of the installments of taxes levied for this drain, and such supplemental or

deficiency assessment as shall be sufficient to pay all outstanding bonds of the district. We issued an order to show cause and it was stipulated between the parties that the answer of the drain commissioner and the board of supervisors should stand as the return to that order.

The proceedings to establish this drainage district were instituted on June 3, 1927, under Act No. 316, Pub. Acts 1923, (1 Comp. Laws 1929, Sec. 4836 et seq. [Stat. Ann. Sec. 11.1 et seq.]) which only authorize the construction of drains. This act has been since amended (Act No. 318, Pub. Acts 1929, and others) and now includes provisions for the building of sewers and sewage facilities in connection with drains. The proceedings progressed in the usual manner and bonds in the par amount of $191,000 were issued. The entire issue was purchased by a brokerage house in the City of Detroit and payment therefor was made to the county treasurer. The bonds were resold to various investors and these relators now hold 150 bonds of the outstanding issue.

The construction was of an underground type, of vitrified, double strength sewer crock, with catch basins for surface waters and Ys for sanitary sewer connections to each residential lot, capable of caring for sanitary sewage and surface waters of the whole area of the district. The underground conduits range from 12 to 54 inches in diameter.

The bonds have been in default since May 1, 1931, due to the suspension of the levy of installments of the assessment for this project during the years 1932 to 1936, inclusive. All bonds are now past due and interest has been in default since May 1, 1940. On December 12, 1940, relators entered into written agreement with the drain commissioner, board of auditors, and treasurer of

the county, whereby 30 per cent of the accrued interest was cancelled and refunding bonds were to be issued. Relators surrendered their interest coupons, consented to an indorsement on their bonds of a receipt for all interest to May 1, 1940, and were paid 70 per cent of the accrued interest. Respondent drain commissioner then sought authority for the issuance of refunding bonds and, on February 13, 1941, the Michigan Public Debt Commission signed an order authorizing such an issue. Relators were later informed by respondents that they would neither issue such refunding bonds nor levy any further taxes for the payment of existing bonds. The answer of respondents avers in substance that the refunding agreement, having been executed without the authority or approval of the board of supervisors, is void and of no force and effect, and that, because of the holding of this court in Village of Oak Park v. Van Wagoner, 271 Mich. 450, decided May 17, 1935, the bonds held by relators are void.

In the 12 briefs that have been filed in this cause by the parties and various amici curiae, to whom leave was granted, it is conceded that decision in this case affects not only the possibility of payment of the defaulted bonds of this issue, but many millions of other outstanding drain bonds.

The issues presented may be summarized as follows:

1. Is the decision in Village of Oak Park v. Van Wagoner, 271 Mich. 450, either res adjudicata or stare decisis?

2. Are respondents estopped by the recitals in the bonds?

3. May the validity of the drainage proceedings be attacked in a collateral suit?

4. Is Royal Oak No. 7 Storm Sewer Drain a sewer or a drain?

5. Is mandamus the appropriate remedy?

Litigation regarding the validity of drainage projects has been determined by this court in various cases, among which are the following: Clinton v. Spencer, 250 Mich. 135; Warren v. Township of Engelbrecht, 251 Mich. 608; Kinner v. Spencer, 257 Mich. 142; Township of Lake v. Millar, 257 Mich. 135; Hankinson v. Deake, 265 Mich. 1; Village of Clawson v. Van Wagoner, 268 Mich. 148; Village of Oak Park v. Van Wagoner, 271 Mich. 450; Kennedy v. Dingman, 272 Mich. 24; Meyering Land Co. v. Spencer, 273 Mich. 703; Detroit Fire & Marine Ins. Co. v. Oakland County, 284 Mich. 130; Detroit Trust Co. v. Dingman, 291 Mich 170.

In none of the above cases were bondholders actual parties, although respondents argue that bondholders were represented by the drain commissioner. Holders of bonds issued on projects covered by some of the foregoing cases have litigated their claims in the Federal courts. The most recent Federal decision is Bloomfield Drain District v. Keefe, 119 Fed. (2d) 157. Other Federal cases are an unreported one before Judge Raymond in the Western District of Michigan and Royal Oak Drain District v. Keefe, 87 Fed. (2d) 786.

No useful purpose would be served in reviewing the cited cases, each of which has been re-examined as to its applicability to the issues presented. Careful consideration requires the conclusion that decision in the instant case is governed by the reasoning in Village of Oak Park v. Van Wagoner, 271 Mich. 450. Although five members of the court concurred specially in the opinion in that case, nevertheless the court was unanimous in holding

that the Royal Oak No. 7 project was a sewer and not a drain; that the defendant drain commissioner was wholly without jurisdiction in the premises, and that therefore the entire proceedings were void and subject to collateral attack. In arriving at this conclusion, the court unanimously concurred in the statement that, "The acts of the drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law." We held unanimously that all assessments levied against the village should be cancelled and set aside and permanently restrained the drain commissioner from collecting, or attempting to collect, the same or any portion thereof.

The project was designated "Royal Oak No. 7 Storm *Sewer* Drain," and the bonds bore the heading, "Royal Oak No. 7 Storm *Sewer* Drain District Bond." It was recited in the bonds "that all acts, conditions and things required to be done, precedent to and in the issuance of this bond in order to make it a binding obligation of the Royal Oak No. 7 Storm *Sewer* Drain District have been done * * * and for the prompt payment hereof * * * the full faith, credit and resources of said Drain District are hereby irrevocably pledged." The underground conduits are all of the same size and character as when they were laid and are serving the same purpose for which they were laid. If the levy of a tax in 1935 "would constitute the taking of property without due process of law," the levying of a tax now would also constitute the taking of property without due process of law.

We do not say that the Village of Oak Park case, supra, is res adjudicata of the rights of these relator bondholders nor do we hold that they had their day in court, through representation by the drain commissioner who

was the defendant in that action. We do say, however, that the rule of stare decisis should be applied even though equitable considerations might prompt a different result. Detroit Trust Co. v. Detroit City Service Co., 262 Mich. 14, 35. See, also People v. Droste, 160 Mich. 66, 75, and Colborne v. Detroit United Railway, 177 Mich. 139, 142. Since we held in 1935 that it was illegal to levy and collect any tax assessed as a result of this project, under the doctrine of stare decisis we must hold now that it is illegal to levy and collect a tax to pay outstanding bonds issued incident to the same project.

It is urged that respondents are estopped by the recitals in the bonds to deny their validity. Generally speaking, a municipal corporation cannot be estopped by the unauthorized and illegal acts of its officers. Certainly the board of supervisors of Oakland county cannot be estopped by the drain commissioner of that county because he had no legal authority whatever to speak for them and the counter signature of the county clerk was merely a ministerial act.

Is the drain district estopped by the recitals of the drain commissioner? Among the authorities cited in support of relators' contention, the case of Thompson v. Village of Mecosta, 127 Mich. 522, is typical. In that case the Village of Mecosta had authority to issue public improvements bonds and, so far as the bonds issued were concerned, they were perfectly good on their face. There was nothing to challenge the attention of the purchaser, such as the title of the proceedings and the heading of the bonds in the instant case. They were designated only as public improvement bonds of the Village. The bonds were, however, "delivered to the Hutchinson Manufacturing Company of Jackson, Mich., as a bonus

or aid to parties erecting a gristmill," a purpose for which the village wholly lacked authority to issue bonds, namely, a private improvement. The bonds upon their face "unquestionably carried a false pretense." This court held that—

> "a bona fide purchaser for value had a right to rely upon the statement of the board, appearing in the bond, that it was issued to borrow money under this act, for lawful purposes; i. e., public improvements." Citing authorities.

Judgment, however, for plaintiff was reversed and a new trial ordered because of the absence of proof of bona fides.

In the instant case there is no showing, and can be no showing, of false pretense. Each obligation now in question bore the title, "Royal Oak No. 7 Storm *Sewer* Drain District Bond." The drain commissioner had no authority to build a *sewer* drain. He was wholly without jurisdiction and his void acts cannot estop the drain district, even though it can be argued that the taxpayers of the drain district have profited by his unauthorized acts.

Since relators do not present a case warranting the relief asked for, we need not pass upon the propriety of mandamus as a remedy in this action.

The writ of mandamus is denied. A public question being involved, no costs will be allowed.

Signed: George E. Bushnell
Henry M. Butzel
Edward M. Sharpe
B. D. Chandler
Raymond W. Starr,
Emerson R. Boyles
Walter H. North
Howard Wiest

(Title of Court and Cause)

BEFORE THE ENTIRE BENCH:

BOYLES, J. I concur on the ground that no facts are adduced in this case outside of those before us in Village of Oak Park v. Van Wagoner, 271 Mich. 450. This record shows that every step in the proceeding resulting in the issuance of these bonds, from the original application for laying out the drainage district to issuing the bonds thereon, refers to a *Storm Sewer Drain.* At the oral argument and in numerous briefs filed by amici curiae, it is urged that the validity of at least eleven other bond issues involving several millions of dollars depends upon the decision in this case. The validity of such issues depends upon the facts and circumstances under which they were issued. See Royal Oak Drain District, Oakland County, Mich. v. Keefe (U. S. Circuit Court of Appeals [6th Circuit], January 14, 1937), 87 Fed. (2d) 786. We repeat that the controlling legal distinction between sewers and drains is the primary purpose of the structure which determines its character regardless of what may be purely incidental purposes. Kennedy v. Dingman, 272 Mich. 24. The Federal courts likewise recognize the Michigan rule, here repeated, that the drain district or municipality is not estopped from denying validity of a bond issue on the ground of total lack of jurisdiction. Bloomfield Village Drain District v. Keefe, and four other cases, (U. S. Circuit Court of Appeals [6th Circuit], March 14, 1941), 119 Fed. (2d) 157.

Signed: Emerson R. Boyles
Howard Wiest
Walter H. North
B. D. Chandler
Raymond W. Starr
Henry M. Butzel
Edward M. Sharpe

I agree with the amplification as stated by Mr. Justice Boyles.

Signed: George E. Bushnell

Endorsed:
Filed Feb. 11, 1942
Jay Mertz
Clerk Supreme Court

In the Supreme Court—Clerk's Office

State of Michigan—ss.

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the opinions filed February 11, 1942, in said Court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at Lansing, this 23rd day of March, A. D. 1942.

Jay Mertz,
Clerk.

(Seal)